FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 346.

THE UNITED STATES, APPELLANT,

vs.

THE CHEROKEE NATION.

No. 347.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE CHEROKEE NATION.

No. 348.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

53D CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { Ex. Doc. No. 182.

MONEYS DUE THE CHEROKEE NATION.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING

A COMPLETE ACCOUNT OF ALL MONEYS DUE THE CHEROKEE NATION UNDER TREATIES MADE IN COMPLIANCE WITH THE ACT OF CONGRESS APPROVED MARCH 3, 1893.

JANUARY 9, 1895.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, January 7, 1895.

SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stat. L., 645), a certified copy of "a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1865, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect," prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of the Cherokee national council accepting such accounting.

Very respectfully,

HOKE SMITH, *Secretary.*

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
Washington, D. C., January —, 1895.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed statement is a true and literal copy of the original, as appears from the records and files of the Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

HOKE SMITH,
Secretary of the Interior.

The undersigned, appointed under the 3rd article of the agreement made at Tahlequah on the 19th day of December, 1891, between Commissioners on the part of the United States, and on the part of the Cherokee Nation, to "render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of monies due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835-6, 1841, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect," respectfully submit the following report.

TREATY OF 1817:

The treaty of 1817 provided for the cession of certain lands in Georgia, Tennessee and Alabama to the United States in consideration of certain lands, acre for acre, in the then Territory of Arkansas, on the Arkansas and White Rivers. Appended hereto are maps showing the several cessions of territory by the Cherokee Nation, and also to the Cherokee Nation, covered by the treaty of 1817* and subsequent treaties. The cessions to and by the United States are shown upon both maps in blue. No consideration other than land was made to the Cherokee Nation for the cession of the lands in the states named. The treaty provided, however, that the annuities accruing under former treaties should be paid to the Eastern and Western Cherokees in proportion to their numbers, and a census of those who had emigrated west of the Mississippi River as well as those remaining in the original country was to be taken to determine the respective amounts of the annuities due to each branch of the Nation.

These annuities arose under the treaty of June 26, 1794,† which stipulated that in lieu of all former sums to be paid annually the United States should furnish the Cherokee Nation with goods, annually, to the amount of $5,000; the treaty of October 2, 1798,‡ by which the United States agreed to furnish the Cherokee Nation annually, in addition to the annuities provided for in former treaties, goods to the amount of $1,000; and the treaty of October 25, 1805,§ by which the United States guaranteed a further annuity of $3,000. Under these treaties, therefore, the Cherokee Nation was entitled annually to goods or money to the amount of $9,000.

The census provided for in the treaty of 1817 was not taken; but by the treaty of February 27, 1819,‖ it was agreed that the annuities should be paid two-thirds to the Cherokees east, and one-third to the Cherokees who had emigrated to Arkansas. These annuities were regularly paid according to this agreement to and including the year 1824.

*U. S. Statutes at Large, Vol. 7, page 156.
†U. S. Statutes at Large, Vol. 7, page 43.
‡U. S. Statutes at Large, Vol. 7, page 62.
§U. S. Statutes at Large, Vol. 7, page 93.
‖U. S. Statutes at Large, Vol. 7, page 195.

TREATY OF 1804.

By a treaty made October 24, 1804,* an additional annuity of $1,000 per year was guaranteed to the Cherokee Nation. This treaty was mislaid in Washington and its existence seems to have been forgotten until 1824, when it was discovered and proclaimed on the 17th day of May. It is this treaty, made in 1804, which is alluded to in the articles of agreement before-mentioned, (dated December 19, 1891,) as the treaty of 1825. No treaty, as a matter of fact, was made with the Cherokees in this year. The twenty years accrued annuity under this treaty was appropriated March 3, 1825,† and the accrued interest, amounting to $12,889, being for the average time of 10½ years at 6%, was appropriated June 14, 1836.‡ The annuity of $9,000, increased to $10,000 by the treaty of 1804, was fully, though by no means regularly, paid down to and including the year 1835, when it was commuted for the sum of $214,000, in accordance with the eleventh article of the treaty made December 29th of that year. There is nothing due the Cherokee Nation, therefore, under the treaty of 1817.

TREATY OF 1819.

By the treaty of February 27, 1819,§ a further cession of land was made by the Cherokee Nation, the ceded land being shown on the map hereto annexed in red. By the first article of this treaty it was stipulated that the reservations contained in the 2nd article of the treaty of Tellico, signed 25th October, 1805,‖ and a tract of land in Alabama, twelve miles square, were ceded to the United States in trust for the Cherokee Nation as a school fund; to be sold by the United States and the proceeds invested as provided in the 4th article of the same treaty. By article 4, it was stipulated that the reservations, and the tract reserved for a school fund in the first article of the treaty, should be surveyed and sold in the same manner and on the same terms with the public lands of the United States, and the proceeds invested under the direction of the President of the United States in stock of the United States, or such other stock as he might deem most advantageous to the Cherokee Nation.

The tract of land twelve miles square located on the Tennessee River in Madison County, Alabama, containing 93,938.16 acres was surveyed, and there have been sold, up to April 1, 1894, 67,657.63 acres, yielding $106,383.20, the several sums comprising which have been from time to time added to the school fund of the Nation.

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* U. S. Statutes at Large, Vol. 7, page 228.
† U. S. Statutes at Large, Vol. 4, page 93.
‡ U. S. Statutes at Large, Vol. 5, page 45.
§ U. S. Statutes at Large, Vol. 7, page 196.
‖ U. S. Statutes at Large, Vol. 7, page 93.

The reservations in the 2nd article of the treaty of Tellico (27th October, 1805), consisted of a small tract lying at and below the mouth of Clinch river; two sections of one square mile each, one at the foot of Cumberland mountain, the other on the north bank of the Tennessee river "where the Cherokee Taloostiskee now lives." These tracts, being on the north side of the Tennessee river within the State of Tennessee, are indicated upon the accompanying map by letters "A," "B," and "C." Tennessee not being a public land State there was no authority for the survey and sale of these lands. They were claimed by white persons by virtue of Revolutionary land grants made by the State of North Carolina, and by other persons under grants made by the State of Tennessee, and after much controversy and compromise were finally confirmed to citizens of Tennessee.

The history of the litigation and subsequent disposal of these lands is of no importance beyond the fact that, although they were ceded by the Cherokee Nation to the United States in trust, for sale and the investment of the proceeds for the benefit of the Cherokee school fund, they were not sold and the Cherokee Nation has derived no benefit whatever from the cession. It seems clear that as these three tracts of land were a part of the consideration of the treaty of 1819, the Cherokee Nation should be paid their value at the time the treaty was made, with interest until the time of payment. The one-mile-square tracts contained 640 acres each. From the field notes of Col. Martin, on file in the Indian Office, it appears that the small tract contained, substantially, 420 acres. The total acreage of the three tracts was therefore 1,700 acres, which, at $1.25 per acre, would amount to $2,125, which sum, with interest from February 27, 1819, to the time of payment, is due to the Cherokee Nation.

TREATY OF 1828;

The treaty of 1828* was made with the Western Cherokees, who, under the provisions of the treaties of 1817 and 1819, had emigrated to Arkansas. It provided for the removal of that branch of the tribe from within the limits of Arkansas to substantially the present location of the Cherokee Nation in the Indian Territory. The Cherokee Nation east was not a party to the treaty and acquired no rights under it any further than that the Government agreed in the 8th article to remove and subsist for one year after arrival in the Indian Territory any Eastern Cherokees who desired to join that portion of the tribe which had emigrated and were then known as "Western Cherokees," and in addition to pay the sum of $12.50 to each emigrant. Under article 5 of the treaty, the United States agreed to pay the Western Cherokees the sum of $50,000 as the difference in value between the lands in Arkansas and the lands in the Indian Territory; an annuity of $2,000 per year for three years, as indemnity for probable loss caused by the straying of stock; $8,780 for spoliations; and $2,000

*U. S. Statutes at Large, Vol. 7, page 311.

annually for ten years for educational purposes. These sums were appropriated by the act of May 24, 1828,* and were fully and properly paid to the Western Cherokees.

TREATY OF 1833;

The treaty of February 14, 1833,† is practically a duplication of the treaty of 1828. In describing the boundaries of the land to be occupied by the Cherokees removing from Arkansas to what is now the Indian Territory, certain lands which had already been ceded to the Creek Nation, were included; and the purpose of the treaty of 1833 was to rectify this error, and to alter the boundary of the lands ceded to the Cherokees so as to exclude the Creek lands from the Cherokee grant, and to include other lands of equal area. Both of these treaties (1828 and 1833) were made with the Western Cherokees, and the Eastern Cherokees had no interest in or rights under them except as has been hereinbefore stated. The claims of the Western Cherokees arising under these and subsequent treaties were referred to the Court of Claims by the act of February 25, 1889;‡ and adjudicated by decision No. 16,599, decided November 30, 1891. This adjudication disposes of all claims which arise under the treaties of 1828 and 1833, even if the stipulations of these treaties were not faithfully performed. As a matter of fact, however, the agreements contained in these treaties were carried out and there is consequently nothing due under them.

TREATY OF 1835;

Subsequent to the treaty of 1828 and prior to the treaty of 1835,§ almost continuous efforts were made to induce the Cherokee people to emigrate to the Indian Territory. In 1802‖ a compact was entered into between the United States and the State of Georgia, whereby the latter ceded to the former all of its lands without its present boundaries, and the United States agreed to extinguish all the Indian titles within its present limits as soon as it could be reasonably and peaceably done. It was to carry out this agreement with the State of Georgia that numerous propositions were made to the Cherokee Nation to induce its emigration. In the meantime, the white population of Georgia was rapidly increasing and serious encroachments were being made upon the territory reserved to the Cherokees by the treaty of 1819. In addition to this individual encroachment the Legislature of Georgia had assumed to extend the jurisdiction of the State over the Cherokee Nation, and had enacted legislation tending to the destruction of the Cherokee national authority.

* U. S. Statutes at Large, Vol. 4, page 300.
† U. S. Statutes at Large, Vol. 7, page 414.
‡ U. S. Statutes at Large, Vol. 25, page 694.
§ U. S. Statutes at Large, Vol. 7, page 478.
‖ The Public Domain, page 80.

Under these circumstances a very small fraction of the Cherokee Nation, appreciating the impossibility of the continuance of Cherokee occupation of lands within the State of Georgia, made the treaty of New Echota, providing for the surrender of its eastern possessions and the emigration of the Nation west of the Mississippi. This treaty was repudiated by a very large majority of the Cherokee Nation who refused to emigrate under its provisions, and various propositions were made, both by the Principal Chief of the Nation, John Ross, and by representatives of the United States, looking to a satisfactory adjustment of the controversy. Nothing was accomplished under this treaty until the fall of the year 1837, except that those Cherokees in sympathy with the purposes of the treaty were removed, or removed themselves, west of the Mississippi. In 1837 the Cherokee Nation practically accepted the provisions of the treaty and agreed to remove, and did remove, under the direction of Mr. Ross, to the Indian Territory.

It is under this treaty that the chief claim of the Cherokee Nation against the United States arises. This claim has been in dispute since the date of the treaty; and the proper construction of this instrument has been the subject of innumerable reports, memorials, petitions and opinions. It becomes of importance, therefore, to carefully examine the true intent and meaning of this treaty.

The following extracts from the treaty itself and the supplementary articles thereto* cover the points at issue, and are here extended for convenience of reference:

> ARTICLE 1. The Cherokee Nation hereby cede relinquish and convey to the United States all of the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoilations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles. But as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river" have included and made any allowance or consideration for claims for spoilations it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision and if no allowance was made for spoilations that then an additional sum of three hundred thousand dollars be allowed for the same.

Article 2nd describes the territory ceded to the Cherokee Nation, and contains the following clause:

*U. S. Statutes at Large, Vol. 7, page 488.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

This article also describes the additional quantity of land in the Territory of Kansas, known as the neutral lands and shown upon the annexed map colored yellow.

ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggagewagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided.

ARTICLE 10. The President of the United States shall invest in some safe and most productive public stocks of the country for the benefit of the whole Cherokee nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee nation west of the Mississippi the following sums as a permanent fund for the purposes hereinafter specified and pay over the net income of the same annually to such person or persons as shall be authorized or appointed by the Cherokee nation to receive the same and their receipt shall be a full discharge for the amount paid to them viz: the sum of two hundred thousand dollars in addition to the present annuities of the nation to constitute a general fund the interest of which shall be applied annually by the council of the nation to such purposes as they may deem best for the general interest of their people. The sum of fifty thousand dollars to constitute an orphans' fund the annual income of which shall be expended toward the support and education of such orphan children as are destitute of the means of subsistence. The sum of one hundred and fifty thousand dollars in addition to the present school fund of the nation shall constitute a permanent school fund, the interest of which shall

be applied annually by the council of the nation for the support of common schools and such a literary institution of a higher order as may be established in the Indian country. And in order to secure as far as possible the true and beneficial application of the orphans' and school fund the council of the Cherokee nation when required by the President of the United States shall make a report of the application of those funds and he shall at all times have the right if the funds have been misapplied to correct any abuses of them and direct the manner of their application for the purposes for which they were intended. The council of the nation may by giving two years' notice of their intention withdraw their funds by and with the consent of the President and Senate of the United States, and invest them in such manner as they may deem most proper for their interest. The United States also agree and stipulate to pay the just debts and claims against the Cherokee nation held by the citizens of the same and also the just claims of citizens of the United States for services rendered to the nation and the sum of sixty thousand dollars is appropriated for this purpose but no claims against individual persons of the nation shall be allowed and paid by the nation. The sum of three hundred thousand dollars is hereby set apart to pay and liquidate the just claims of the Cherokees upon the United States for spoliations of every kind that have not been already satisfied under former treaties.

ARTICLE 11. The Cherokee nation of Indians believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the nation; and their present school fund amounting to about fifty thousand dollars shall constitute a part of the permanent school fund of the nation.

ARTICLE 12. * * * It is also understood and agreed that the sum of one hundred thousand dollars shall be expended by the commissioners in such manner as the committee deem best for the benefit of the poorer class of Cherokees as shall remove or have removed west and are entitled to the benefits of this treaty. The same to be delivered at the Cherokee agency west as soon after the removal of the nation as possible.

ARTICLE 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, removal subsistence and debts and claims upon the Cherokee nation and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national funds; provided for in the several articles of this treaty the balance what-

ever the same may be shall be equally divided between all the people belonging to the Cherokee nation east according to the census just completed; and such Cherokees as have removed west since June 1833 who are entitled by the terms of their enrolment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east they shall also be paid for their improvements according to their approved value before their removal where fraud has not already been shown in their valuation.

SUPPLEMENTARY ARTICLES TO TREATY OF 1835.

ARTICLE 1. It is agreed that all the pre-emption rights and reservations provided for in articles 12 and 13 shall be and are hereby relinquished and declared void.

ARTICLE 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi river was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question and whereas the President is willing that this subject should be referred to the Senate for their consideration and if it was not intended by the Senate that the above-mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provision should be made therefor as might appear to the Senate to be just.

ARTICLE 3. It is therefore agreed that the sum of six hundred thousand dollars shall be and the same is hereby allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions and of the sum of three hundred thousand dollars for spoliations described in the 1st article of the above mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate and if they shall approve the same then this supplement shall remain part of the treaty.

ARTICLE 4. * * * It is also understood and agreed, that the one hundred thousand dollars appropriated in article 12

for the poorer class of Cherokees and intended as a set-off to the pre-emption rights shall now be transferred from the funds of the nation and added to the general national fund of four hundred thousand dollars so as to make said fund equal to five hundred thousand dollars.

It will be observed that by article 8 of this treaty the United States agrees and stipulates to remove the Eastern Cherokees to their new home and to subsist them one year after their arrival there. Under the 15th article of the same treaty it is provided that the residuum of the five million dollars, after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, removals, subsistence, etc., shall be distributed per capita among the Cherokees east. By article third of the supplementary articles to the same treaty an additional appropriation of $600,000 is made to include the expense of removal. The question at issue under the treaty of 1835 is: Is the expense of removal properly chargeable to the five million treaty fund?

THE INTENT OF THE TREATY OF 1835.

This treaty had its origin in an agreement made by a delegation of the Cherokee nation to submit to the Senate to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands east of the Mississippi river. Upon this submission the Senate advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river."

A question arose between the treaty parties whether, in fixing this sum "not exceeding five millions of dollars," the Senate had included and made any allowance for claims for spoliations, and it was agreed that this question should be submitted again to the Senate, and if no allowance was made for this object, that an additional sum of three hundred thousand dollars be allowed therefor. (Art. 1, Treaty of 1835.)

A further question also arose between the treaty parties whether the Senate intended the said five million dollars should include the cost of the removal of the Cherokees to the country west of the Mississippi, and the value of certain claims which certain Cherokees had against citizens of the United States, and it was agreed that this question should be referred to the Senate for its consideration, and if it was not intended that the sum of five million of dollars should include the said objects that such further provision should be made therefor as might appear to the Senate to be just. (Art. 2, supplementary articles to treaty of 1835, concluded March 1, 1836.)

It evidently was not intended by the Senate that the five million dollars should include the objects specified, inasmuch as by the third article of the supplementary articles to the treaty of 1835, duly ratified by that body, the sum of six hundred thousand dollars was al-

lowed to the Cherokees to include the expense of their removal, and all claims of every nature and description not otherwise expressly provided for, said sum to be in lieu of reservations and pre-emptions, and of the sum of three hundred thousand dollars for spoliations described in the first article of the treaty of 1835.

The suggestion referred to in the second article of the supplementary treaty of 1835, (March 1, 1836), was made in the following communication, which was signed by Senator Cuthbert and others who voted for the ratification of the treaty. The treaty upon submission to the Senate, was ratified by only one majority. It is a reasonable inference, therefore, from this communication, that if the intent of the treaty had been understood to be that the cost of the removal was to be deducted from the Five Million Fund, it would not have been ratified in its then shape, but would have been amended to conform to the understanding expressed in this note to the President:

FEBRUARY 29, 1836.

We have no hesitation in stating it to be our impression, sir, that the Senate of the United States did not intend that the allowance for spoliations or the expenses of removal should be deducted from the amount of five millions recommended to be offered to the Cherokees as the price of their property. It is also our confident opinion that the Senate will readily add six hundred thousand dollars to the sum of five millions to meet these two expenditures.

With the greatest respect, etc.

——— ———

To the PRESIDENT OF THE UNITED STATES.

The reasonable interpretation of the third article of the supplementary agreement of March 1, 1836, seems to be, therefore, that it was intended to exempt from the operation of the 15th article of the treaty of 1835, which provided that the various expenditures, allowances, and investments provided for in the several articles of the said treaty, should be deducted from the Five Million fund, the expense of removal, and the claims not otherwise expressly provided for. It apparently was the understanding of the Senate that this sum of six hundred thousand dollars would fully cover the cost of removal and these additional claims, since it provided that any surplus which might remain should be turned over and belong to the educational fund. This expectation was evidently based upon and warranted by the schedule appended to a preliminary treaty, made March 14, 1835, between Agent J. F. Schermerhorn and a Cherokee delegation headed by John Ridge.* In this schedule, which shows the amount to be deducted from the Five Million fund for national funds, improvements, etc., appear the following items:—

*H. R. Docs., Vol. 7, No. 286, p. 39, 24th Cong. 1st Session.

For removals	$255,000.
" claims & spoliations	250,000.
Aggregating	505,000.

It should be borne in mind that neither when this schedule was prepared, nor in December of the same year, when the treaty which was finally ratified was made, was the removal of the entire Cherokee people contemplated. Both treaties provided for the continued residence in the east, upon certain conditions, of Cherokees who were averse to removal. As finally ratified, the treaty of December required the removal of the entire nation, and by reason of the increased number of emigrants a larger sum than the estimate was provided.

The eighth article of the treaty of 1835 recites, "The United States also agree and stipulate to remove the Cherokees to their new homes, and to subsist them one year after their arrival there." This article was ratified without amendment. Under the agreement of submission it was competent for the Senate to declare that its intention was that the sum of five million dollars should cover all the expenditures consequent upon carrying out the provisions of the treaty, in which case the cost of removal and subsistence, as well as the other items specified, would necessarily have to be charged to, or deducted from, the five millions, as provided in the 15th article of the treaty of 1835.

The apparent conflict between the 8th and 15th articles is reasonably accounted for by the uncertainty respecting the decision of the Senate. If the Senate insisted upon the five million as the maximum sum to be paid, the 15th article would be fully operative; if, on the contrary, additional allowances were made for certain specific objects, such objects would be relieved from the operation of that article. The 8th article having been ratified without amendment, and the question submitted to the Senate in the 2nd article of the supplementary treaty having been answered substantially in the negative, by the further allowance of six hundred thousand dollars, "to include the expense o ftheir removal," the conclusion seems unavoidable that the intention of the Senate was that the five million dollars allowance should not be charged with the expenses of removal. The same reasoning would apply equally to the cost of subsistence, and was subsequently adopted by the government, by the re-payment to the Cherokees of the amount expended for this purpose which had been charged to and deducted from the treaty fund.

Prior to the general migration of the Cherokee Nation in the late fall and winter of 1838, the sum of $600,000 appropriated by the supplementary articles of the treaty of 1835, had been practically exhausted. No further appropriation, however, would have been necessary if it had been the original understanding that the expense of removal and subsistence was to be charged to the treaty fund, there then remaining of that fund more than sufficient to meet that

expense. On the 12th of June, 1838, a further appropriation was made as follows:

In full of all objects specified in 3d article of supplementary articles of treaty of 1835 with Cherokees, and for the further object of aiding in subsistence of said Indians for one year after removal west; Provided, That no part of said money shall be deducted from the five million stipulated to be paid said tribe by said treaty	$1,047,067.00

This appropriation was based upon the following estimates submitted by the Secretary of War to the Speaker of the House of Representatives, March 25, 1838:*

In compliance with the resolution of the House of Representatives of the 23d instant, requiring a statement of the amount that will be required for the additional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

The payment of the expenses of removing the remaining Cherokees, estimated at 15,840, at $30 a head..	$475,200.00	
Amount applicable to that purpose.....	39,300.00	
Balance to be provided for.....		435,900.00
If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival in the west, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated to be paid by treaty, viz: $33.33 a head.....		611,167.00
		1,047,067.00

It is evident that the estimate of $30 per head as the cost of removal was not based upon full knowledge of the actual expense, since it appears that the expenditure per head for the removal of those who emigrated voluntarily, prior to the general movement of the nation under the conduct of John Ross, was $61.70; and no reason appears for the belief that future removals could be accomplished for a less sum.

The great bulk of the Cherokee Nation was averse to removal. The voluntary emigration covered a very small fraction of its people. A large majority of the tribe had been gathered in camps and were held under military guard, and preparations were being made for immediate removal under the escort of the United States troops. There was great danger of an outbreak, and it seemed probable that

*Vol. 10, Ex. Docs. No. 410, 25th Cong. 2nd Session.

the attempt to complete the forcible removal would lead to open hostilities and perhaps involve a serious war.

Under these circumstances, having become convinced that ultimate removal was inevitable, Mr. John Ross submitted a proposition to General Scott, offering to undertake the removal at a cost of $65.88 per head.

General Scott considered the estimate too high and asked Mr. Ross to reconsider it. Upon further examination, Mr. Ross replied to Gen. Scott that, so far from reducing the estimate, a slight increase would be necessary for furnishing certain articles which had been omitted from the original estimate. Gen. Scott, being under the impression that the cost of removal was to be paid from the treaty fund, acceded to the final proposition, and the removal was begun. The journey covered a distance of about 800 miles, and was based upon the assumption that it could be accomplished in 80 days. As a matter of fact the emigration occupied 125½ days on the average, and involved a cost of a fraction over $103.25 per head. It does not appear that the time occupied in the journey was unnecessarily extended by the parties having charge of the emigration; on the contrary, it does appear, from the statement of Gen. Scott, that the season and the roads were exceedingly bad and the difficulty and cost of procuring provisions very great.

Under the voluntary emigration there had been complaints respecting the sufficiency and quality of rations and the facilities for transportation and the care of the sick, and it was the intention of Mr. Ross to furnish an extra number of wagons and additional care for the sick and infirm. It was also to be expected that an emigration conducted by Mr. Ross would occupy a longer time than if conducted under the escort of the United States troops. Even under the better conditions of the Ross emigration, so far as facilities were concerned, the process of removal was exceedingly tedious and disastrous, as is emphatically shown by the fact that there were over 600 deaths in the 12 detachments during the journey.

The total amount paid John Ross for the removal was $1,357,745.86. The first payments comprised the sum of $776,398.98, leaving an unpaid balance of $581,346.88. The payment of this sum was for some time refused, but finally, after a very lenghty correspondence and discussion and re-examination of the case, the amount was allowed by direction of President Tyler. It is to be borne in mind that if the emigration had been undertaken under the conduct of the United States Army it would not only have involved a very great expense for military escort, but the emigrants would necessarily have to be kept under very strict guard to avoid desertion. Even under the voluntary emigration the desertions ranged from 1 to 18 per cent, and it is questionable whether but for the agreement made with Mr. John Ross, the government would have been able to safely deliver a substantial portion of the Cherokee Nation in the Indian Territory. Under these circumstances, considering the difficulties arising from an inclement season, bad roads, snow

and ice, the fact shown by the number of deaths, that a very large number of the emigrants were sick and infirm, it cannot reasonably be claimed that the expense of removal was seriously exaggerated, while on the other hand, it seems clear from the history of the case, that the removal was accomplished with a much less expense to the United States than if it had been involuntary, under the direction of Gen. Scott.

It is unquestionably true that Mr. John Ross and his brother both realized a substantial profit from the contract for removal, but it nowhere appears that either they or the members of the Nation at large understood, or had any reason to understand, that the arrangement which had been made with the Secretary of War in the direct line of the several treaty provisions was to be carried out at the expense of the treaty fund and to be deducted from the per capita amount which had been promised in the various negotiations which preceded the final ratification of the treaty.*

THE UNDERSTANDING OF THE CHEROKEE NATION:

The Supreme Court of the United States, in their decision the case of Worcester *v.* The State of Georgia, say:

> The language used in treaties with Indians ought never to be construed to their prejudice. * * * How the words of the treaty were understood by this unlettered people (the Cherokees), rather than their actual meaning, should form the rule of construction. (6 Peters, p. 576.)

The understanding of the Cherokee people respecting this question of removal is clear. It has been agitated for several years and many propositions looking to this end had been made to them, all, with one exception, contemplating the payment of the cost of removal and subsistence by the United States.

Under the treaty of 1817, the United States agreed to pay, and did pay, the expense of the removal of the Cherokees who emigrated under that treaty. The treaty of 1828, made with the Western Cherokees, contained the following provision:

> ART. 8. And that their brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, east of the Mississippi, who may desire to remove west, shall be given, on enrolling, himself for emigration, a

*For detailed account of the transactions leading up to the treaty of 1835, and the execution of its provisions, see Sen. Docs. Vol. 2, No. 120, 25th Cong. 2d Sess. & H. R. Docs. Vol. 5, No. 1698, 27th Cong. 2d Session.

> good rifle, a Blanket, a Kettle, and five pounds of tobacco; (and to each member of his family one blanket); also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation, and support, by the way, and provisions for twelve months after their arrival at the Agency; and to each person, or head of a family, if he take along with him four persons, shall be paid immediately on his arriving at the Agency and reporting himself and his family, or followers, as emigrants and permanent settlers, in addition to the above, provided he and they shall have emigrated from within the Chartered limits of the State of Georgia, the sum of fifty dollars, and the sum in proportion to any greater or less number that may accompany him from within the aforesaid Chartered limits of the State of Georgia.

It seems to have been the opinion of the War Department as late as November 18, 1836,* that the above article was not superceded or annulled by the treaty of 1835. On that date Mr. Commissioner Harris wrote Maj. B. F. Currey, Indian Agent in the Cherokee country, as follows:

> SIR: I acknowledge the receipt of your letter of the 26th of Oct. last, and in reply, have to observe that I have taken the decision of the Secretary of War ad interim upon the claim of the Cherokees to commutation for subsistence, at $33,33 each. The Secretary decides that the commutation may be paid at the rate above stated; but at the same time declares that the allowance is made under the treaty of 1828, and not in pursuance of any stipulation of the final treaty of 1835.

The same opinion has been held in various reports to the Senate and House of Representatives from the Committee on Indian Affairs. Without quoting from them at length the following extract, from report dated February 19, 1847,† made to the Senate by Mr. Jarnigan, gives substantially the view which has been expressed in various forms in the reports referred to:

* * * * * * *

> The sole consideration stated for the five millions was "their lands and possessions east of the Mississippi river." If anything else had been intended to be included, such as claims for spoliations, subsistence, removal, &c., why was it not so stated in the treaty? It is enough to show that it is not so stated; but it is manifest that such was not the intention of the parties; for

*Senate Docs., Vol. 2, No. 120, p. 209, 25th Cong. 2nd Session.
†Senate Docs., Vol. 3, No. 157, 29th Cong. 2nd Session.

the amount of these spoliations, the expense of removal, &c., were not then known, and could not have been ascertained; and besides, there were subsisting claims upon the Government of the United States, which they were bound by the treaty to have paid. Not to pay them, or to pay them out of the funds of the Cherokees which had been fixed by the Senate as the value of their lands, was precisely the same thing.

The United States were bound by the treaty of 1828 to pay the expenses of the removal of all the Cherokees. This obligation was not released by the purchase of their lands at their appraised value. Would such a thing be pretended in a similar transaction between individuals? If all the Cherokees had removed before they ceded their lands, the United States were bound to pay the cost of removal. If the United States afterward bought the lands of the Cherokees, they were bound to pay the price at which they were appraised. The first article of the treaty recites that "the Cherokee nation hereby cede to the United States their lands, east" &c. It will be seen by the above that subsistence and removal were not included in the above article, nor was any question as to either of those items then even thought of. But the only thing pretended to be charged upon this fund was spoliations. The Senate decided that the sum of $5,000,000 was given for the lands alone, and a supplemental article giving $600,000 was added to pay for spoliations and removal, but still not including subsistence. That sum it was then thought would be sufficient to cover these charges; but it was found that it was not; and the United States, feeling that they were bound to pay these charges, again, in 1838, appropriated $1,047,000 for these objects. Both of these sums, which were added by Congress, were found inadequate to pay these various charges and the fund of five millions has been used for that purpose and others, to its exhaustion, or nearly so. They ask to be relieved from the charges for removal and subsistence. It is very clear that not until after the exhaustion of the $6,000 and the $1,047,000 did the officers of the government of the United States ever once think that the $5,000,000 was liable for these charges. Not one dollar of that fund was ever so used until then.

The following communication* from the then Secretary of War shows that his understanding was, that this fund was not liable for these charges, or else he would not have made the requisition for the sum of $1,080,000, that is to say, $1,047,000 for these purposes, and $33,000 for annuities. Congress made the appropriation at once, which shows that the opinion of that body was the same. If the five million fund was liable for these charges, how could the Secretary have said that there were no funds to meet them, when there was the five million

* See page 23.

fund? Why did Congress make this additional appropriation? The only answer which can be given is, that it was considered just under the treaty, as the Senate had said, when the subject was a second time referred to that body for its decision on this specific question, that the treaty fund of five millions was not liable to be charged with these expenses.

* * * * * * *

The treaty fund was never touched, nor was it ever pretended that it was liable for these charges, until after the appropriation made for these specific objects had been exhausted. Now it seems very clear that if the government of the United States was liable for these charges when the additional sum of $600,000 was given, and then again when the further sum of $1,047,000 was given, it is equally liable now for whatever may remain of these charges, after both of these sums have been exhausted. The magnitude of the obligation cannot be held to release the party from its fulfillment.

* * * * * * *

The committee therefore report, and recommend the adoption of the following resolutions:*

Whereas, by the treaty of the 6th of August, 1846, between the United States and the Cherokee Indians, certain questions were agreed to be submitted to the decision of the Senate;

1. *Resolved*, That, in the opinion of the Senate, whatever balance of the fund of $5,000,000 stipulated to be paid to the Cherokee nation by the treaty of the 29th December, 1835, and the subsequent additions thereto, may now be ascertained to be due to the said Cherokee nation, shall bear an interest at the rate of five per cent. per annum from the time found due until the same be paid by the United States.

2. *Resolved*, That the charge for one year's subsistence of the Cherokees, after their arrival in the west, is not a proper charge upon the fund of $5,000,000 aforesaid, but should have been paid independently of that fund, by the United States.

3. *Resolved*, That the expense of removing the Cherokees to the west should, in like manner, have been borne by the United States, and not charged to the fund of $5,000,000 aforesaid.

4. *Resolved*, That the United States will pay to the Cherokee nation the sum of $10,000 for lands guaranteed to the Cherokee nation by the treaty of Tellico, signed 25th October, 1805, and of which the said Cherokee nation was deprived by the authority of the State of Tennessee, and the further sum of $35,568 for the balance remaining unsold, by the United States, of a reservation of twelve miles square in Alabama, secured to the Cherokee nation by the treaty of 27th of February, 1819, being at the rate of 62½ cents per acre.

*There was only 13 days remaining of the session, and no action appears to have been taken upon these resolutions.

If the position taken in this report be correct, and the United States was bound, under the treaty of 1828, and notwithstanding the treaty of 1835, to remove the Cherokees to the Indian Territory, it effectually disposes of the question whether the cost of such removal was a proper charge against the treaty fund.

To return to the question of the understanding of the Cherokees respecting the treaty of 1835: Prior to the adoption of this treaty, strenuous efforts were made by the United States to secure the prompt removal to the western country of the Cherokee Nation, and various propositions were made to them looking to the conclusion of a treaty for that purpose.

In September, 1830,* Col. John Lowry made a proposition to them, in behalf of the United States, in which the United States agreed to remove the Cherokees and subsist them one year after their arrival west.

In April, 1832,† Mr. E. W. Chester, in the same behalf made another proposition, under which the United States was to remove the Cherokees to their new country, and pay the expenses of such removal, and also to provide them with subsistence for one year after removal.

In September, 1832,‡ Gov. Lumpkin, of Georgia, in the same behalf, made the Cherokees a proposition substantially similar to that made by Mr. Chester.

In March, 1833,§ a proposition was made to the Cherokees by the President, offering to pay them $2,500,000 in goods for their land, with the proviso that they should remove themselves, at their own expense, which proposition was rejected by the Cherokee Council.

June 19, 1834,‖ a treaty was made between John H. Eaton, on the part of the United States, and Andrew Ross, and others, on the part of the Cherokee Nation. This treaty was rejected by the Senate, the Cherokee Nation protesting against its ratification. In this treaty appears the following clause, respecting removal and subsistence:

> Fourthly. To cause emigrants to be carried to their homes, under the guidance of some faithful conductors, at the expense of the United States, and they are furthermore, to be furnished with the means of living for twelve months after their arrival.

The treaty of March 14, 1835, before referred to, was agreed upon at the city of Washington between J. F. Schermerhorn, on the part of the United States, and a delegation of the Cherokee Indians, which the President of the United States directed to be submitted to the Cherokee Nation for their consideration. Article 9, of this treaty, provides in part as follows:

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*Indian Office files, letter-book No. 7, page 347.
† " " " " " " 8, " 297.
‡ " " " " " " 9, " 218.
§ " " " " " " 10, " 18 & 110.
‖H. R. Docs., Vol. 7, No. 286, p. 133, 24th Cong. 1st Session.

The United States also agree and stipulate to remove the Cherokees to their new homes, and to subsist them one year after arrival there, and that a sufficient number of steam boats and baggage-wagons shall be furnished them to remove them comfortably, and so as not to endanger their health; and that a physician well supplied with medicines, shall accompany each detachment of emigrants removed by the Government. They shall also be furnished with blankets, kettles, and rifles, as stipulated in the treaty of 1828. The blankets shall be delivered before their removal, and the kettles and rifles after their removal, in their new country. Such persons and families as, in the opinion of the emigrating agent, are capable of subsisting and removing themselves, shall be permitted to do so; and they shall be allowed in full for all claims for the same, twenty-five dollars for each member of the family, slaves excepted, for whom (those not owned in the nation) they shall be allowed eighteen dollars each; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents, if they prefer it. And, in order to encourage immediate removal, and with a view to benefitting the poorer class of their people, the United States agree and promise to pay each member of the Cherokee nation one hundred and fifty dollars on his removal, at the Cherokee agency west, provided they enrol and remove within one year from ratification of this treaty; and one hundred dollars to each person that removes within two years;

This treaty provided for the payment of $4,500,000 with an additional quantity of land west valued at $50,000, making a total payment of $5,000,000 from which the payments for removal, subsistence, improvements and ferries, and all other expenditures were to be deducted. Forming a part of article 18 is the following schedule, containing the estimate for carrying into effect the several stipulations of the treaty:

For Removal	$255,000.00
Subsistence	400,000.00
Improvements and ferries	1,000,000.00
Claims and spoliations	250,000.00
Domestic animals	10,000.00
National debts	60,000.00
Public buildings	30,000.00
Printing press, etc	5,000.00
Blankets	36,000.00
Rifles	37,000.00
Kettles	7,000.00
Per capita allowance	1,800,000.00
General fund	400,000.00
School fund	160,000.00
Orphan's fund	50,000.00
Additional territory	500,000.00
	5,000,000.00

This treaty was submitted to the Cherokee people at a general council at Red Clay on the 23rd day of October, 1835. A letter from President Jackson was read and translated to the council, in which he said:*

I shall in the course of a short time, appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you, more fully, my views, and the nature of the stipulations which are offered to you.

These stipulations provide:

1st. For an addition to the country already assigned to you west of the Mississippi, and for the conveyance of the whole of it, by patent, in fee simple. And also for the security of the necessary political rights, and for preventing white persons from trespassing upon you.

2d. For the payment of the full value to each individual of his possessions in Georgia, Alabama, North Carolina and Tennessee.

3d. For the removal, at the expense of the United States, of your whole people; for their subsistence for a year after their arrival in their new country, and for a gratuity of one hundred and fifty dollars to each person.

4th. For the usual supply of rifles, blankets and kettles.

5th. For the investment of the sum of four hundred thousand dollars, in order to secure a permanent annuity.

6th. For adequate provision for schools, agricultural instruments, domestic animals, missionary establishments, the support of orphans, etc.

7th. For the payment of claims.

8th. For granting pensions to such of your people as have been disabled in the service of the United States.

These are the general provisions contained in the arrangement. But there are many other details favorable to you which I do not stop here to enumerate, as they will be placed before you in the arrangement itself. Their total amount is four millions five hundred thousand dollars, which, added to the sum of five hundred thousand dollars, estimated as the value of the additional land granted you, makes five millions of dollars; a sum, which, if equally divided among all your people east of the Mississippi,—estimating them at ten thousand, which I believe is their full number, would give five hundred dollars to every man, woman and child in your nation. There are few separate communities, whose property, if divided, would give to the persons composing them such an amount.

Mr. Schermerhorn also said, respecting the pecuniary benefits to result from this treaty,† after reciting the smaller advantages:

*H. R. Docs., Vol. 7, No. 286, page 41, 24th Cong., 1st session.
†Senate Docs., Vol. 2, No. 120, page 458, 25th Congress, 1st session.

> The United States will also pay $150 per head to every Cherokee who enrolls and removes the first year, and $100 to those who remove the second year after the ratification of the treaty; but no pay of this kind will be made to those who remove after two years. This is truly a provision for the poor of the Nation. The wealth of the rich men consists in their lands, improvements and negroes, but the poor men's riches are his women and children. A poor man, if he has ten children, if he removes the first year, will get when he arrives at the west of the Mississippi, $1,500; and the same proportion if his family are larger or smaller.

It is to be noted that both President Jackson and the agent, Mr. Schermerhorn, lay great stress upon the amount to be paid to the individual Cherokees under the per capita division of the residuum of the treaty fund. The amount to be divided, as shown by the schedule, was $1,800,000. It was this consideration which induced the Cherokees to consent to removal. But for the promise that they should receive, and the expectation of receiving, a substantial sum in money, they would not have accepted the treaty of 1835, and their removal could have been accomplished only by military force, and at great expense. It is plain that neither President, agent, nor Cherokees could have contemplated that a larger sum than shown in the schedule should be deducted from the Five Million Fund, inasmuch as a greater deduction would have rendered impossible such a per capita allowance as was promised by the representatives of the United States and expected by the tribe.

This preliminary treaty failed of ratification, and the final treaty of December 29, 1835, was made, substantially upon the basis of the former treaty, but containing the submission to the Senate, whether removal and spoliations were included in the Five Million Fund, which was answered by the additional appropriations of six hundred thousand dollars to cover the two items which had been specifically objected to in the discussion of the former treaty, and the inclusion of which had caused its rejection by the Cherokee council.

Under the treaty of 1835, enrollment books for voluntary emigration were opened in the then Cherokee Country. Instructions as to the nature of the enrollment were sent by Acting Secretary of War C. A. Harris, to Lieut. J. Van Horne, U. S. A., dated September 12, 1837, in part as follows:

> Enrolling books must be prepared on the following plan: A memorandum, or entry, must be inserted, purporting that the subscribers assent to a treaty with the United States upon the terms heretofore offered by the President to their people. And that if no treaty should be made during the next fall, or early in the winter, then the subscribers will cede to the United States all their right and interest in Cherokee lands east of the Mississippi, upon the following conditions: that they shall receive, so fast

as Congress shall make the necessary appropriations, the ascertained value of their improvements, on their arrival west; that they shall be removed and subsisted for one year at the expense of the United States; that they shall be entitled to all such stipulations as may be hereafter made in favor of those who do not now remove, excepting so far as such stipulations may depend on the cession of rights or improvements, for which the subscribers have been previously allowed a compensation; that they shall have their full share of the three years annuity, now remaining unpaid and that they shall also be entitled to their just proportion of the Cherokee school reservation under the treaty of 1819.

Here again appears the statement "that they shall be removed and subsisted for one year at the expense of the United States." Up to this time it had been the practice of the government to pay the cost of removal and subsistence for one year, when transferring tribes from the east to the west. The Chickasaws, Choctaws, Creeks and Seminoles were all removed upon these terms, and there was no reason why a different rule should govern the removal of the Cherokees. All of these tribes were neighbors of the Cherokees, who were generally informed of the circumstances and terms of their removal.

Still, further, on the 18th day of May, 1838,* Mr. Poinsett, then Secretary of War, in writing to Mr. John Ross respecting the removal, said:

> If it be desired by the Cherokee Nation, that their own agents should have charge of their emigration, their wishes will be complied with, and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect. With regard to the expense of this operation which you ask may be defrayed by the United States, in the opinion of the undersigned, the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made of Congress.

And, also, under date of June 1, 1838,† in explaining to General Scott, then in command in the Cherokee country why the negotiation for the Ross removal had not been effected through him, said:

> No new treaty has been made, nor propositions for a treaty entertained; but it is proposed to make such allowances to the Cherokees as it is believed were intended originally by the Senate.

The understanding of this treaty by the treaty party, with whom it was made, is shown by the following statement contained in their

*Indian Office files, letter-book No. 24, page 222.
†H. R. Docs., Vol. 11, No. 453, p. 3, 25th Cong. 2nd Session.

memorial to the United States government, dated April 13, 1844.* It will be observed that the amount to be distributed per capita is increased over that contained in the schedule forming a part of the preliminary treaty by reason of the additional appropriations of $600,000 and $1,047,067, but not by the aggregate of those sums, as the items to be deducted are also increased. This statement is here included merely to show the general understanding which the parties to the treaty had respecting the individual benefits to be derived from the per capita division of a very large sum:

> The number of persons of the Cherokee Nation, according to the census of 1835, including whites and blacks and North Carolina Indians, was 16,743. Thus at $20 per head, the United States would be entitled to a credit of $334,860 for removal. For subsistence $558,044.14.

The account current will therefore stand thus:

The United States in account with the Cherokees, under the treaty of 1835.

DR.

To this amount appropriated under the 1st article of the treaty including amount retained for land	$5,000,000.00
This amount appropriated under the 3d supplemental article of the treaty	600,000.00
This amount of additional appropriation for objects specified under the 3d supplemental article, and for subsistence	1,047,067.00
Total	6,647,067.00

*H. R. Docs., Vol. 5, No. 234, 28th Cong. 1st Session.

The United States in account with the Cherokees, under the treaty of 1835—Continued.

CR.

By this amount paid for improvements under the 9th article of the treaty		$1,647,917.33	
This amount paid for spoliations under the 9th article and 3d supplemental art. of the treaty		570,511.67	
This amount allowed for removal, estimating numbers according to census of 1835, at $20 each		334,860.00	
This amount allowed for subsistence upon the same basis, at $33.33 each		558,044.00	
This amount paid for debts of the Cherokee Nation, as per 10th art.		50,000.00	
This amount paid for lands not appropriated, but withheld		500,000.00	
Pd. for national funds, 10th art	$200,000		
Pd. for education funds, 10th art	150,000		
Pd. for orphan's funds, 10th art	50,000		
		400,000.00	
Added to education fund, 4th supplemental article		100,000.00	
			$4,171,333.00
Leaving a balance against the United States			2,475,734.00

Or $147.86 each.

The "application for such further sum as may be required for this purpose" was made to Congress, and in response thereto the appropriation of $1,047,067 was made. The cost of removal and subsistence proved to be very much larger than was anticipated and provided for in this appropriation. The excess of cost of subsistence over the amount appropriated has been refunded to the Cherokee Nation; but upon the assumption that the United States was to pay the expense of removal there is due the Cherokee fund the sum of $1,111,284.70, as per the following statement:

Total expense of removal and subsistence		$2,952,195.26
To which the United States contributed the difference between the amount actually paid for spoliations ($264,894.09) and $600,000 appropriated July 2, 1836	$335,105.91	
Amount appropriated by act of June 12, 1838	1,047,067.00	
Amount appropriated by act of September 30, 1850	189,422.76	
Part of amount appropriated by act of February 27, 1851, being sums paid to agents of the United States, originally charged to treaty fund and then reimbused	99,999.42	
		1,668,595.09
Charged to treaty fund		1,283,601.17
Of which there was expended for subsistence, after the expiration of one year, properly chargeable to the Cherokee fund		172,316.47
Leaving balance due the Cherokee Nation		1,111,284.70

Eliminating wholly from the account the appropriations for, and the expenditures on account of removal and subsistence, and deducting from the $5,000,000 fund the items properly chargeable thereto, the statement would be as follows:

Due to Cherokee Nation for lands and possessions east of Mississippi river		$5,000,000.00
Appropriation for spoliations by supplemental treaty Mar. 1st, 1836, being so much of $600,000 as actually paid for this purpose		264,894.09
		5,264,894.09
Deduct:		
For spoliations	$264,894.09	
For improvements	1,540,572.27	
For ferries	159,572.12	
For debts and claims upon the Cherokee Nation	101,348.31	
For the additional quantity of land ceded to the Nation	500,000.00	
For amount invested as the general fund of the nation	500,880.00	

For subsistence furnished after expiration of one year under agreement that it should be charged to treaty fund.....	172,316.47	3,239,583.26
		2,025,310.83
Per capita distribution.....		914,026.13
Leaving balance due as shown on preceding page		1,111,284.70

The above amounts of expenditure are taken from a joint report of the Second Auditor and Second Comptroller, made December 3, 1849,* in accordance with a resolution of Congress, passed August 7, 1848.† The vouchers covering these disbursements were again carefully examined and a report made in 1884, by Mr. Jesse Arnold, of the Second Auditor's office, for the use of the Court of Claims in the suit of the Western Cherokees against the United States. The result of the examination of over 30,000 vouchers was an exact confirmation of the report of 1849.

Although under the treaty of 1835, the removal of the Cherokee nation was practically completed in 1838, no steps were taken for several years looking to carrying out the provisions of the treaty. Meantime the nation was divided into three branches, the "Old Settler" or Western Cherokees, comprising those who had emigrated under the treaties of 1817 and 1819; the treaty party composed of a small proportion of the nation who had been parties to the treaty of 1835 and who had removed themselves or been removed by the government prior to 1837–8, and, lastly, the government or Ross party, comprising the great majority of the nation who had repudiated the treaty of 1835, but had finally yielded to the necessities of the situation so far as to remove under the direction of John Ross. Each of these three parties had a grievance,, and each was opposed to both of the others, for reasons growing out of its particular relations to the making and execution of the treaty. The Old Settlers were aggrieved because, having by the session of their lands in Arkansas acquired an exclusive right to the lands of the Indian Territory, there was precipitated upon them a great number of Eastern Cherokees, comprising both the treaty and government parties, without any provision being made for compensation to them for the restricted use of the western territory, consequent upon such an access of population. The treaty party felt aggrieved because after having made the treaty with the United States government, the United States had practically withdrawn its support from them by reason of which they were subjected to harsh and vindictive legisla-

*Sen. Ex. Doc. Vol. 6, 31st Cong. 1st Session.
†U. S. Statutes at Large, Vol. 9, No. 6, page 339.

tion by the government party, which, upon its arrival in the western territory, by sheer force of numbers, assumed to control and did control the affairs of the entire Cherokee Nation.

The government party continued to regard its forced removal as an injustice and hardship, and this feeling was aggravated by the failure of the government of the United States to carry out the provisions of the treaty of 1835. Under these circumstances the nation was in a condition of continuous ferment; several of the leading men of the government party and the treaty party were murdered, and it was contemplated by the latter branch of the nation to remove wholly without the limits of the Indian Territory. Finally, with a view to preserving harmony, delegations representing the three branches were brought to Washington, and the result of protracted negotiations and numerous conversations with the different delegations was that the treaty of August 6, 1846,* was finally concluded.

It provided for an examination and payment to each section of the nation of its just claims arising out of the treaty of 1835, and the collateral circumstances connected therewith. Under article 3, it was provided that certain claims which had been allowed by the several boards of commissioners appointed under the treaty of 1835 to estimate the value of improvements, spoliations, etc., which had been charged to those items under the names of rents and dispossessions and reservations, should be reimbursed to the treaty fund.

These amounts, as will presently appear, were fully restored to the treaty fund, and there is consequently no just claim against the United States by reason of the charges alluded to in the 3rd article. The same article provided further that the expenses of making the treaty of New Echota, which it states were also paid out of the fund, should likewise be reimbursed. This statement was an error. The expense of making the treaty of New Echota, amounting to $37,212, was paid by direct appropriation made July 2, 1836, and was never charged to the national fund.

Article 4, of the treaty of 1846, provided for a settlement with the Old Settlers or Western Cherokees, and, under this article, there was paid to them, practically as a consideration for the lands which were occupied by the Eastern Cherokees on their migration to the west, but nominally as one-third of the residuum of the treaty fund, based upon the assumption that the Western Cherokees comprised one-third of the entire nation, the sum of $532,896.90.† Still later, as has been stated, the Western Cherokees were authorized‡ to bring a suit for additional claims in the Court of Claims, under which adjudication an additional sum of $224,972.68, with interest, and an allowance of $4,179.26, being the value of certain lands in Arkansas, was awarded them, the total award amounting to $830,578.64. The sum of $224,972.68 was reduced by the Supreme Court to $212,376.94, and the judgment affirmed.§

*U. S. Statutes at Large, Vol. 9, page 871.
†Act of Sept. 30, 1850, making appropriation for Indian Dept.
‡Act of Feby. 25, 1889, 25th Stats. page 694.
§U. S. Reports 148, page 427.

Under the 6th article it was provided that $115,000 should be paid the treaty party by reason of their losses and expenses incurred in consequence of the treaty of 1835, of which $5,000 was paid to the heirs of Major Ridge; $5,000 to the heirs of John Ridge; $5,000 to the heirs of Elias Boudinot, $25,000 to the delegation representing the treaty party in making the treaty of 1846, the balance of $75,000 to be distributed among the individual members of the treaty party. This amount of $115,000 was appropriated by the act of March 1, 1847, and was duly distributed to those entitled to share in the distribution.

Article 9 of this treaty provides for a settlement of the claims of the nation arising out of the distributions under the treaty of 1835, and is as follows:

> ARTICLE IX. The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee nation of Indians, for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation and, also, all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto.

This article provides substantially, as will be seen, for a settlement with the Cherokee Nation upon the basis of the treaty of 1835, and for the deduction from the sum of $6,647,067 of the charges properly to be made against it under the terms of that treaty, and the distribution per capita of the residuum. It is evident from the use of the word "properly" in this section that it was not the intention to increase or enlarge the deductions which were to be made from the treaty fund, either in numbers or in character. Whatever was properly chargeable under the 15th article of the treaty of 1835, was also chargeable under the 9th article of the treaty of 1846, but nothing more. In pursuance of this article a resolution was passed by Congress on August 7, 1848, instructing the proper accounting officers of the Treasury to render a statement of the balance found due the Cherokee Nation, which was transmitted to Congress December 3, 1849, and was as follows:

For Improvements		$1,540,372.27
" ferries		150,372.72
" spoliations		264,804.09
" removal and subsistence and commutation therefor, including $2,765.84 expended for goods for the poorer Cherokees, under the 15th art. of treaty of 1835, as follows:		
Removal, subsistence & commutation	$2,823,192.93	
Physicians, matrons, medicines, hospital stores, etc...	32,003.91	
Superintendents, clerks, interpreters, disbursing, issuing and enrolling agents, conductors and contingencies	99,999.42	
		2,952,196.26
For debts and claims upon the Cherokee Nation:		
National debts (10th Art.)..	18,062.86	
Claims of U. S. citizens (10th Art.)	61,073.49	
Cherokee Committee (12th Art.)	22,212.76	
		101,348.31
For the additional quantity of land ceded to the nation		500,000.00
For amount invested as the general fund of the nation		500,880.00
		6,019,463.65
Appropriation July 2, 1836	$5,000,000.00	
" " " "	600,000.00	
" June 12, 1838	1,047,067.00	
		$6,647,067.00
Deducting above amount		6,019,463.65
Gives balance found due by Second Auditor and Second Comptroller		627,603.35

The sum of $96,999.42 shown in the above account was considered by Congress not to be a proper charge against the $6,647,067, and was appropriated and restored to the said fund by the Act of February 27, 1851.*

In the total amount of $2,952,196.26, for removal, subsistence, etc.,

*U. S. Statutes at Large, Vol. 14, page 572.

there was included the amount of $189,422.76, which was the sum paid for subsistence in excess of the amount appropriated by the act of June 12, 1838, for this specific purpose. This amount was also considered an improper charge against the treaty funds, and was appropriated and restored to the said funds by act of September 30, 1850.*

The total amount for distribution per capita, therefore, was:†

Amount found due by Treasury officials		$627,603.95
Additional appropriations by Congress, as above		96,999.42
Making total sum for per capita distribution		914,026.13
Of this sum there was sent to John Drennan, Superintendent of Indian Affairs, for distribution to the Eastern Cherokees, then in the west, from the appropriation of September 30, 1850	$164,523.66	
And to Alfred Chapman, for distribution to the Cherokees still remaining in the east but entitled to participate in the distribution	24,627.58	189,151.24
And of the sum of 724,603.37 appropriated by act of February 27, 1851, there was remitted to Mr. Drennan for the same purpose as the former remittance to him	629,379.47	
And to Mr. Chapman for the same as the prior remittance to him	95,223.90	724,603.37
There was retained on account of payments already made to individual Cherokees (exclusive of interest, which amounted to $170.61)		271.52
A total disbursement of		914,026.13
There was also distributed as interest upon the above sums:		
Upon the sum paid by Superintendent Drennan		514,459.02
And upon the sum distributed by Mr. Chapman		77,683.02
Total per capita distribution		1,506,168.17
Add interest item, as above		170.61
Total principal and interest appropriated		1,506,338.78

*U. S. Statutes at Large, Vol. 14, page 556.
†Indian Office files, Ledger No. 9, pages 177 and 199.

The total number of Cherokees participating in this distribution was 16,231, of whom 14,098 were Cherokees in the west and 2,133 remained east. The per capita amount was $92.79.

Figuring upon the basis stated in the 9th article of the treaty of 1846, and following the Auditor's and Comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067, the excess of payments over the amounts appropriated by the United States for that purpose, the true statement of the accounts is as follows:

For Improvements	$1,540,572.27
" ferries	159,572.12
" spoliations	264,894.09
" removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items: { $335,105.91 / 1,047,067.00 }	1,382,172.91
For debts and claims upon the Cherokee Nation	101,348.31
For the additional quantity of land ceded to the nation	500,000.00
For amount invested as the general fund of the nation	500,880.00
For subsistence furnished after expiration of one year under agreement that it should be charged to treaty fund	172,316.47
	4,621,756.17
For lands and possessions	5,000,000.00
" spoliations	264,894.09
Balance of $500,000 applicable to removal	335,105.91
Appropriation June 12, 1838	1,047,067.00
	6,647,067.00
From which deduct charges as above	4,621,756.17
Balance to be distributed per capita	2,025,310.83
Deduct amount actually distributed, as already explained	914,026.13
Balance due	1,111,284.70

Under article 8 of the treaty of 1846, the sum of $20,000 was also appropriated in lieu of all claims of the Cherokee Nation, as a nation, prior to the treaty of 1835, except all lands reserved by the treaties heretofore made for school funds. This amount was appropriated by act of March 1, 1847, and was duly paid to the Cherokee nation. The several appropriations which have been made cover the liability of

the United States to the Cherokee Nation under the treaty of 1846, treating the above sum of $1,111,284.70 as arising under the treaty of 1835.

TREATIES OF 1866 & 1868.

The treaty of 1866* grew out of the fact that the nation had been divided during the war and until the time of making the said treaty. The great majority of the Cherokee Nation was loyal, but a substantial percentage sympathized with the Confederacy and furnished troops to the Confederate cause. The country had been over-run by both Federal and Confederate troops, and the improvements which existed at the beginning of the war had practically been wiped out of existence. The Cherokee Nation was, therefore, in an exceedingly impoverished condition while the feuds growing out of the war still continued.

The object of the treaty was to harmonize the differences between the northern and southern sympathizing elements, and also to restore the tribe to its former condition. It provided for general amnesty; for the repeal of certain confiscation laws which had been directed against that section of the tribe which had allied itself with the Confederacy; for the freedom of the slaves and for the reorganization of the government.

Under article 15, it was provided that the United States might settle any civilized Indians, friendly with the Cherokees and adjacent tribes within the Cherokee country, on the unoccupied lands east of the 98th meridian west longitude. Any tribe so settled, not retaining its tribal organization, was required to pay into the Cherokee national fund a sum of money, bearing the proportion to the national fund which the number of the tribe so settled bore to the entire number of the Cherokee Nation. If the tribe so settled east of the 98th meridian desired to preserve its tribal organization, it was to contribute in like manner to the national fund, and, in addition, pay for the lands allotted to it, at a price to be agreed upon between such tribe and the Cherokees, the President of the United States having the right to fix a price in case of disagreement.

Under article 16, the United States had the privilege of settling friendly Indians in any part of the Cherokee Country west of the 98th meridian, and to allot such tribes a quantity of land not exceeding 160 acres to each person, to be paid for at an agreed price, subject to the decision of the President, as before stated, in case of disagreement.

By article 17, the Cherokee Nation ceded in trust to the United States, the tract of land in the State of Kansas which had been ceded to it by the treaty of December 29, 1835, known as the "neutral" lands, and shown upon the second map appended hereto; also a strip of land within the State of Kansas, shown upon the same map and marked "Cherokee Strip." These lands were to be surveyed and sold

*U. S. Statutes at Large, Vol. 14, page 799.

in the same manner as the public lands of the United States are sold, and the proceeds distributed among the General, School, and Orphan funds of the Nation, in the proportion of 50, 35, and 15 per cent respectively. The Secretary of the Interior was authorized to pay the drafts of the nation to an amount not to exceed $150,000, out of the funds belonging to the nation.

Under article 29, as amended, the Secretary of the Interior was also authorized to pay the reasonable cost and expenses of the delegates who made the treaty, such payments to be reimbursed out of the proceeds of the sales of the "neutral" lands in Kansas.

These provisions cover the treaty of 1866, so far as it comes within the scope of this accounting between the United States and the Cherokee Nation.

The treaty of 1868* was practically an addition or supplement to the treaty of 1866, whereby the Cherokee Nation ratified an agreement which had been entered into by the Secretary of the Interior and Mr. James F. Joy, for the purchase by the latter of the entire unoccupied portion of the "neutral" lands, and for the method of payment.

Under the treaty of 1866, by virtue of an agreement made between the Delawares and Cherokees, dated April 8, 1867, the former nation was located in the Cherokee country east of the 96th meridian, and became incorporated with the Cherokee Nation. The number of Delawares was 985, and the Cherokees 13,573, and the ratio which one bore to the other was one to thirteen seventy-eight one hundredths, which ratio formed the basis upon which was determined the amount to be paid to the Cherokees by the Delawares for an equal interest in the national fund of the Cherokees, viz: $678,000 and $1,000,000, the estimated value of the neutral lands ceded by the 17th article of the Cherokee treaty of July 19, 1866.

The amount of land purchased by the Delawares from the Cherokees, under their agreement, was 157,600 acres, which, at $1.00 per acre, aggregated the sum of $157,600, and the amount paid to the Cherokee Nation for an interest in national funds, $121,824.28 aggregating the sum of $279,424.28.

The funds transferred were as follows, viz:

Amount of nonpaying bonds of several southern States, transferred at par as per agreement	$32,000.00
Amount of paying stocks of the State of Missouri	2,000.00
U. S. bonds issued to Union Pacific R. Co: Eastern Division, transferred at market rates, $1.06⅜	245,424.28
Total	279,424.28

These funds were transferred to the credit of the Cherokees, May 13, 1869.

*U. S. Statutes at Large, Vol. 16, page 727.

Under the same treaty a tract of land west of the 96th meridian, and extending as far as the Arkansas river, was sold to the Osage and Kansas Indians, the respective tracts occupied by each being shown upon the accompany map and marked numbers 1 and 2. The amount received by the Cherokee Nation and the disposition thereof, is shown in the following statement:

To amount transferred from sales of Osage lands, in payment for 1,566,784 acres of land purchased by the Osages, per act of March 3, 1873		$1,096,748.80
By amount set apart for the benefit of an orphan institution per act of February 14, 1873	20,000.00	
By amount set apart for the establishment of a literary institution, per act of Feb. 14, 1873	75,000.00	
By amount set apart and invested in United States stocks for the orphan fund, per act of February 14, 1873	80,000.00	
Per capita distribution, act March 3, 1875	200,000.00	
By balance at interest 5 per centum per annum	721,748.80	
		1,096,748.80

$80,000 of the above funds were invested in United States stocks, the face value of which is $71,505.41, and the same were added to the orphan fund, per act of February 14, 1873. The $95,000 set apart by the Act of February 14, 1873, for the benefit of an orphan institution and the establishment of a literary institution was remitted to John B. Jones, Indian Agent, on the 27th of April, 1874.

In like manner, under the same treaty, the Shawnee Indians were incorporated with the Cherokee Nation, under an agreement between the Shawnees and Cherokees, dated June 7, 1869. There were transferred from the Shawnee to the Cherokee funds, as part consideration of the agreement, bonds amounting to $44,726.62, which the Cherokees agree to receive at their original cost, $50,000. There were also transferred to the Cherokees the following Shawnee treaty funds:

Permanent annuity for educational purposes, under treaty of August 3, 1795		$1,000.00
Permanent annuity for educational purposes, under treaty of September 29, 1817	2,000.00	
Interest on $40,000 for educational purposes, under treaties of August 3, 1795, and May 10, 1854	2,000.00	
		5,000.00

The cash value of these annuities, carrying interest at 5% is $100,000, and the interest has since been annually appropriated and paid to the Cherokee Nation. The principal sum of $100,000 has not

been added to the Cherokee funds and remains simply as a paper credit. There seems to be no good reason why this fund should be treated differently from the other funds belonging to the Cherokee Nation, and it is, therefore, found that under this agreement, and treaty of 1866, the Cherokee Nation is entitled to have carried to its credit upon the books of the Treasury the sum of $100,000.

In like manner the Ponca Indians were located west of the Arkansas river, upon the tract shown in the accompanying map and marked No. 4, the consideration being $48,389.46, which sum is included in the amount held in trust by the United States for the Cherokees in lieu of investment, bearing interest at the rate of 5% per annum.

Under the same treaty, the Nez Perces, Otoes & Missourias, and Pawnees were located upon the tracts shown upon the accompanying map, marked Nos. 3, 5 and 6 respectively. The consideration for this land consisted in an appropriation of $300,000 under act of March 3, 1883, to pay the Cherokee Nation for the lands west of the Arkansas river, which sum was to be expended as the acts of the Cherokee legislature directed; provided, that the Cherokee Nation, through its proper authorities, should execute conveyances satisfactory to the Secretary of the Interior to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, and Otoes & Missourias and Osages now occupying said tracts as they respectively occupied the same before the payment of the said sum of money. This $300,000 was deducted from the price paid for the Cherokee Outlet under the articles of the agreement concerning the cession of the Cherokee Outlet, made at Tahlequah, in the Indian Territory, on the 19th of December, A. D., 1891, as were also accounted for the appropriation of $300,000, made by the act of June 16, 1880; the amount paid for the lands assigned to the Poncas, appropriated by the Act of March 3, 1881, and $75,000 appropriated October 19, 1888, to pay certain freedmen and Delaware and Shawnee Indians their proportion of the amount appropriated by the Act of March 3, 1883, before mentioned.

The agreement of December 19, 1891, does not contemplate an examination of any indebtedness or accounts arising under any treaty or agreement subsequent to 1868, and it is sufficient to state that these several sums were advanced to the Cherokee Nation and charged against the proceeds of the sale of the Cherokee Outlet, which is shown upon the accompanying map and described as "Cherokee Outlet" and were accounted for in the transaction concluded by the purchase of the Outlet under the provisions of the act of March 3, 1893.

The territory known as the "neutral lands" was surveyed and sold according to the treaty provisions, and the receipts and disposition of the net proceeds are shown by the following statement:

Sale of Neutral Lands—Treaty of July 19, 1866:		
Gross proceeds, including interest on deferred payments, and premium on sale of coin	$985,296.96	
Expenses of negotiating treaty of 1866, of survey and sale, and of Cherokee delegation	85,461.78	
Net proceeds		899,835.18
Disposition of net proceeds:		
Amount used in payment of national warrants	33,860.12	
Interest carried to the credit of the interest accounts of the National School and Orphan funds	47,627.27	
Amount invested in $740,941.77 United States stocks	818,347.79	
Total		899,835.18

A printed statement showing in detail the receipts and disbursements on account of the sale of these lands, was furnished Mr. D. W. Bushyhead, Treasurer of the Cherokee Nation, by the Commissioner of Indian Affairs, at the request of Mr. Bushyhead, of date May 15, 1874.

The receipts and disbursements of the net proceeds of the sales of the Cherokee Strip are shown in the following statement:

Sale of Cherokee Strip—Treaty of July 19, 1866, and act of Congress of May 11, 1872:		
Gross proceeds, including interest on deferred payments	$560,361.94	
Expenses of survey and sale	22,479.71	
Net proceeds		537,882.23
Disposition of net proceeds:		
Amount invested in $67,675.27 United States stocks, for the benefit of the Cherokee Asylum, Act of Feby. 14, 1873, (17 Stats. p. 462)	75,000.00	
Amount used for the establishment of an Asylum, Act of Feby. 14, 1873	25,000.00	
Amount invested in $30,920.49 for the National, School and Orphan funds	35,890.25	
Amount used in the payments of National warrants	8,275.11	
Amount paid W. A. Phillips, Attorney	6,984.38	
Amount remitted to the Nation, through the U. S. Indian Agent and its National Treasurer	386,300.21	
Balance due the Nation	432.28	
Total		537,882.23

The last item of this statement, "balance due the nation, $132.28," was the balance of the amount received by the Receiver of Public Moneys at Independence, Kansas, in the 4th quarter of 1873, and has never been accounted for by him, and is due the Cherokee Nation, with interest from January 1, 1874, at the rate of 5% per annum.

These several sums comprise all the moneys accruing to the Cherokee Nation under the treaties of 1866 and 1868, and have been properly paid, except as above noted.

Under the treaty of 1835, and the supplement of 1836, it was provided that $300,000 should be set apart as a permanent national fund, $150,000 as a school fund (to which was to be added the amounts received from the sale of the Alabama and Tennessee school lands), and $50,000 as an Orphan fund, and that the annuity of $10,000 should be commuted for the sum of $214,000. These sums amounted to $714,000, and were invested in bonds aggregating $708,761.39. The $52,490, arising from the sale of the Alabama school lands, was likewise invested, the bonds purchased aggregating $51,138, making a total invested fund of $759,899.39.

The additions and deductions to the several funds into which this total amount was divided, together with the receipts and disbursements of interest thereon, are shown with great fidelity of detail in the Indian Office Trust Fund Ledgers, Nos. 1, 2, & 3. As a part of this examination, these accounts have been carefully and exhaustively compared and balanced, and it has been found, both with respect to principal and interest, that the funds have been faithfully administered and that no improper charges have been made against them.

In 1874, at the request of Mr. Bushyhead, the then Treasurer of the Cherokee Nation, a detailed statement of the trust fund account down to May of that year, was rendered to him to enable him to open a proper set of accounts with the United States. The several bond transactions since that time have been printed in detail in the annual reports of the Commissioner of Indian Affairs, which comprise statements of the changes made in the securities, the profit or loss involved in the change, the sources from which the additions to the funds were derived, and the interest due thereupon. Inasmuch as these statements are in print and accessible, it has not been considered desirable to extend them in this report, as it would be mere repetition of transactions of which the Cherokee Nation has full knowledge.

No deduction has been made from the capital of the nation or from the invested fund of the nation with the exception of the years 1867, 1869, 1871 and 1873, when, in accordance with the 23d article of the treaty of 1866, authorizing the Secretary of the Interior to dispose of securities sufficient to realize an amount not exceeding $150,000 for the payment of the debts of the Cherokee Nation, there was sold in 1867, $89,700 of bonds, realizing $90,914.02 and in 1869, $15,000, realizing $16,581.25; in 1871, $3,200, realizing $3,552, and in 1873, $600, realizing $664.50.

The difference between these amounts and the $150,000 amounting to $38,288.23, was derived from the scale of the neutral and strip lands. The only other deduction from the fund, consisting of an interest item on $15,000 taken from the Choctaw fund and expended for the Cherokees, will be further alluded to hereafter.

The following statement shows the several funds of the Cherokee Nation, and the annual interest thereupon, at the date of this report:

*Statement of Stocks and Funds Held in Trust by the United States for the Cherokee Nation.**

Funds.	Treaty or act.	Stocks.	Funds in lieu of investment.	Total.	Annual interest.
National	Dec. 29/35 Ap'l 1/80	†$602,638.56	$775,904.65	$1,378,543.21	$73,833.55
School	Feb. 27/19 Dec. 29/35 Ap'l 1/80	†77,854.28	736,705.98	814,560.26	41,576.55
Orphan	Dec. 29/35 Feb. 14/73 Ap'l 1/80	22,223.26	337,456.05	359,679.31	18,206.20
Asylum	Feb. 14/73 Ap'l 1/80	....	64,147.17	64,147.17	3,207.37
Tota'ls	.....	$702,716.10	$1,914,213.85	$2,616,929.95	$136,823.67

*For details, subject to changes noted above, see Annual Report of the Commissioner of Indian Affairs for 1893, pages 531, 532, and 533.

†Including $68,000 and $15,000 bonds, belonging to the National and school funds, respectively, abstracted prior to 1861.

Changes since November 1, 1893: National Fund:—$20,406.25, out of funds held in lieu of investment, paid to Choctaws, per act of March 3, 1893 (Stats. 27, p. 638). School Fund: $351.20 added to funds held in lieu of investment, from sales of school lands in Alabama.

The interest due the Cherokee Nation upon its funds has been fully, though not regularly, paid. Owing to the fact that some of the investments were in nonpaying State stocks, and that certain of the bonds had been abstracted, the interest was not regularly received by the United States government, and was not, in every instance, remitted at the precise time due, but taking the transaction as a whole, the interest upon both the nonpaying and the abstracted bonds has been paid in full, so that no foundation for a claim on account of interest now exists. During the war period the interest upon these funds instead of being devoted to the specific purposes contemplated by the division of the maximum fund into national, school and orphan funds, was expended for the support of loyal Cherokees who had been dispossessed of their homes and property by reason of the war. Under the circumstances of the Cherokee Nation, it would have been impossible to apply the several items of interest properly belonging to the school and orphan funds to those purposes, as the schools had ceased to exist. In view of the fact that the interest on these funds was expended for the benefit of the

Cherokees for rations, seeds, agricultural implements, clothing and other necessaries of life, no objection can properly be made to this application of this interest. It is understood that the Cherokee Nation makes no objection and raises no question as to the propriety of the interest disbursements during this exceptional period.

On the 4th of June, 1863, $15,000 belonging to the Choctaw orphan reservation fund was remitted to Wm. G. Coffin, Superintendent of Indian Affairs, at Leavenworth, Kansas, and was expended for the relief of persons belonging to the Cherokee Nation. Why the Choctaw funds instead of the Cherokee funds were called upon for this purpose does not clearly appear, but it is evident that there was no warrant for such a diversion: first, by reason of the fact that the Cherokee invested fund at that date amounted to over $800,000; and, secondly, that while it appears from the trust fund ledgers that the interest due the Cherokee Nation had been paid to its treasurer and to Indian Agents on its account to the point of absolute exhaustion, there had accrued and was due to the Cherokee Nation, although not then carried to their credit upon the books, an amount of interest upon the entire fund of the Nation exceeding $100,000, and upon the actual receipts of the sale of the Alabama school land, to an amount exceeding $15,000. By reference to the appropriations of March 1, 1864, and March 3, 1865, it will be seen that at the time of this transaction there was to the credit of the Cherokees a sum many times larger than the amount which was improperly loaned them from the Choctaw funds.

This transaction disappeared from sight and was not brought to light until 1890, when attention was called to it through an examination of the Choctaw accounts made for the use of the Court of Claims in 1889. The Cherokee Nation, therefore, for nearly 30 years, although in possession of ample funds, were unconscious and involuntary borrowers of this sum from the Choctaws. It seems beyond controversy that if the necessities of the Cherokee Nation required the expenditure of $15,000, the amount should have been taken from the interest accrued to their credit, or at any rate from their own fund. The $15,000 was restored to the Choctaw Nation, from interest due upon the Cherokee national funds, by the act of August 19, 1890.* By the act of March 3, 1893,† the interest on this fund from June 4, 1863, to August 18, 1890, amounting to $20,406.25, was paid to the Choctaws and charged to the Cherokee invested fund. While it is true that the Choctaw fund was subjected to this loss of interest, it is equally true that the Cherokee fund never derived any interest benefit from the expenditure of the $15,000, as it was applied to the relief of individual Cherokees. The consequence of this transaction is that the Cherokee fund has been depleted by this amount of over $20,000, by virtue of a loan which it did not request, and of which it had no knowledge, and which it was

*U. S. Statutes at Large, Vol. 26, page 340.
†U. S. Statutes at Large, Vol. 27, page 638.

in a condition to pay at any moment after the loan was made. Under these circumstances, it seems clear that the Cherokee Nation is entitled to a re-imbursement of this amount, the same to be restored to the principal of their national fund, with interest at the rate of five per centum per annum from the date of the payment to the Choctaws.

On the 29th of November, 1851, the Cherokee National Council, by its proper officers, made a formal statement of the national claims arising under the treaties of December, 1835, and August, 1846, stating the several claims as shown in the following numbered paragraphs:

> 1st. Because no allowance is made for the sums taken from the Treaty fund for removal to the West, although that charge depended on precisely the same words in the treaty of 1835 as did the one year's subsistence, and the Senate unanimously decided on the question, submitted to them as arbitrators, that the item of subsistence was not a proper charge on the Cherokee fund. That had been the decision of the Senate about the date of the treaty when that question was specially presented. It was again so considered by Mr. Poinsett, Secretary of War, in 1838, and his decision was sanctioned by the action of Congress, and an appropriation was made for that purpose; but the estimates being too small by half the Indian fund was then for the first time seized upon.

This claim is finally disposed of by the finding respecting the amount due for removal under treaty of 1835.

> 2nd. If it be conceded that the Cherokee fund was liable for these charges their amount was limited by the 8th article of the treaty to a certain specified amount and the government had no right to exceed that amount and charge it to the Indian fund.

This also is disposed of by the finding before alluded to.

> 3rd. We complain that the alternative of receiving for subsistence, $33.33, as provided for in the treaty, was refused to be complied with and the people forced to receive rations in kind at double the cost.

There is no evidence within reach to show whether this complaint is founded upon fact. No specific statement of such claims has ever been presented; but, in any event, that would constitute individual claims and not national claims in the sense in which the term is used under the articles of agreement by authority of which this investigation has been made.

> 4th. We complain that the rations issued by the Military Commandant at Fort Gibson to "indigent Cherokees" was improperly charged to treaty fund, without any legal authority.

This is also covered by the finding under the treaty of 1835. There seems to be no obligation upon the part of the United States, under any of the treaties, to furnish subsistence to emigrants after one year from the date of their arrival in the western country. The amount referred to, $172,316.47, was expended for subsistence after the expiration of one year, and was a necessary expenditure to save a large proportion of the Western Cherokees from great suffering. Unless the amount is to be re-imbursed as a simple act of charity there is no reason for its restoration, and the finding in this respect is that the charge was a proper and legitimate one against the treaty fund.

> 5th. We claim that the United States is bound to re-imburse the amount paid to more than 200 or 300 Cherokees who had emigrated to the west prior to 1835. But who were refused a participation in the "Old Settler" fund and thrown on the emigrant party who removed after that date.

This claim seems to be made without foundation since emigrants who removed west subsequent to June 1833 and before the treaty of 1835 were by article 15 of the treaty, as well as by virtue of the terms of the enrollment, entitled to participate in all benefits arising under the treaty of 1835 as Eastern Cherokees, and were not, by reason of their removal, incorporated with the Old Settlers or Western Cherokees.

> 6th. We claim that the Cherokees who remained in the States of Georgia, North Carolina and Tennessee were not entitled to any share in the per capita fund as they complied with neither of two conditions of their remaining east, both of which were indispensable, and, also, because the census of those Cherokees is, as we believe, enormously exaggerated.

The per capita distribution was made under article 15 of the treaty of 1835, which provides that after deducting from the treaty fund the proper expenses and the amounts set apart for general funds, "the balance whatever the sum may be shall be equally divided between all of the people belonging to the Cherokee Nation east according to the census just completed." The census referred to was taken in 1835 by several agents of the United States Government, and the original is now on file in the Indian Office. This census included the Cherokees residing in the states mentioned in the above claim.

The payments made to the Cherokees in the Indian Territory were based upon a roll made by George Butler in 1851, which was corrected by comparison with the original roll. The census made in North Carolina was based upon a roll made by D. W. Siler in 1851, which roll was also based upon the original. There was not only no exception made to the treaty in this respect to those Cherokees who remained in the east, but it was the understanding at the time the treaty was made that the entire tribe was to participate in the per

capita distribution. There is, therefore, no foundation for the above claim.

7th. We complain that the sum of $103,000 has been charged upon the treaty fund for expenses of Cherokees in Georgia three months after they were all assembled and had reported themselves to Gen'l Scott as ready to commence the march.

This is disposed of by the finding under the treaty of 1835, and the appropriation by Congress of the entire sum expended for subsistence, which wholly relieves the treaty fund from all charges for both removal and subsistence.

8th. We claim interest on the balance found due us from the 15th of April, 1851, till paid, Congress having no power to abrogate the stipulations of a treaty.

This claim is also disposed of in the general finding under the treaty of 1835.

9th. We also complain that $20,000 of the fund of the Emigrant Cherokees were taken to pay the counsel and agents of the "Old Settlers" without any authority.

It does not appear that the United States was in any way a party to this transaction, or is either directly or indirectly responsible for it. It appears, from page 139, trust fund ledger No. 1, Indian Office records, that on the 9th day of August, 1846, there was paid to David Vann, Treasurer of the Cherokee Nation, then in Washington, the sum of $51,131.83, which exhausted the accrued interest to the credit of the Cherokee national fund. While it is unquestionably true that $20,000 of this money was loaned to the representatives of the Old Settler party, it was the action of the Treasurer of the Nation, on his own responsibility, and was wholly a transaction between the Cherokee government party and the Old Settler party. There is, therefore, no claim against the United States on account of this advance or loan.

The foregoing statement covers, it is believed, every point of issue which can be raised under the treaties described in the articles of agreement, and the result of the finding is submitted in the following schedule:

Under the treaty of 1819;
Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the "School" Fund..... $2,125.00
With interest from Feby. 27, 1819, to date of payment.
Under the treaty of 1835;
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to Treaty Fund..... 1,111,284.70
With interest from June 12, 1838, to date of payment.
Under treaty of 1866;
Amount received by Receiver of Public Moneys at Independence, Kansas, never credited to the Cherokee Nation..... 432.28
With interest from January 1, 1874, to date of payment.
Under act of Congress March 3, 1893;
Interest on $15,000 of Choctaw Funds, applied in 1863, to relief of indigent Cherokees, said interest being improperly charged to Cherokee National Fund..... 20,406.25
With interest from July 1, 1893, to date of restoration of the principal of the Cherokee Funds held in trust in lieu of investments.

JAS. A. SLADE.
JOS. T. BENDER.

V. S. HILLIS, *Stenographer.*

WASHINGTON, D. C., *April 28th*, 1894.

Be it enacted by the National Council: That the report of the accounting agents appointed under an agreement between the United States, and the Cherokee Nation, dated the 19th day of December 1891, to "render to the Cherokee Nation through any agent appointed by authority of the National Council, a complete account of moneys due the Cherokee Nation, under any of the treaties ratified in the years of 1817, 1819, 1825, 1828, 1833, 1835–6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States, for the purpose of carrying said treaties or any of them into effect," that said report signed by James H. Slade and Joseph T. Bender, accounting agents on the part of the United States, and dated April 28, 1894, together with the report of R. F. Wyly, agent of the Cherokee Nation, submitted by him to the National Council, and the same is hereby accepted—the total findings of said accounting agents being $1,133,841.98,(one million, one hundred and thirty-three thousand, eight hundred and forty-one dollars and ninety-eight cents,) with interest at the rate of five per cent. per annum, from the various dates

of items composing this amount of claim. (See report of accounting agents for dates of items composing this claim.)

Be it further enacted, That the Principal Chief of the Cherokee Nation, at once notify the Secretary of the Interior, and the Commissioner of Indian Affairs of the acceptance by the National Council of the Cherokee Nation, of said report of accounting agents, and request the Secretary of the Interior, to so notify the Congress of the United States, and ask for an immediate appropriation in accordance with the act of March 3d, 1893, for the ratification of the sale of the Cherokee lands west of the Arkansas River, known as the Cherokee "outlet."

Approved Dec. 1st, 1894.

C. J. HARRIS,
Principal Chief Cher. Nat.

EXECUTIVE DEPARTMENT C. N., *Dec. 15th*, 1894.

I, W. H. Mayes, Asst. Executive Secretary do hereby certify that the above is a true and correct copy of the original, now on file in this office.

W. H. MAYES,
Asst. Executive Secretary.

[SEAL.]

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 346.

THE UNITED STATES, APPELLANT,

vs.

THE CHEROKEE NATION.

No. 347.

THE EASTERN CHEROKEES, APPELLANTS,

vs.

THE CHEROKEE NATION.

No. 348.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

EDGAR SMITH,
CHARLES NAGEL,
FREDERIC D. McKENNEY,
Attorneys for the Cherokee Nation.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 1909

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PRELIMINARY STATEMENT.

By section 68 of the Act of Congress of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein,

and for other purposes" (32 Stats., 716, 726), jurisdiction was conferred "upon the Court of Claims to examine, consider and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," and full power was also conferred upon the Court of Claims "by proper orders and process to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy."

Under the authority of this act the Cherokee Nation on February 20, 1903, filed its petition (No. 23,199) in the Court of Claims, asserting that it is and since the act of union of July 12, 1839, between the Eastern and Western Cherokees "has been a body politic, recognized and dealt with as such by the United States in all matters affecting the rights, interests, and property of the Cherokee Nation, or tribe, or the members thereof" (R., 2); that at the time of the making of the treaty (of December 19, 1891, ratified by act of Congress of March 3, 1893, 27 Stats., 640), for the purchase by the United States from the Cherokee Nation of the lands known as the "Cherokee Outlet," and for many years prior thereto the Cherokee Nation insisted that there was due to it from the United States under stipulations of certain treaties entered into with the latter various sums of money, as to which it, the nation, had long been petitioning the Congress for a true and just accounting and payment, and such an accounting and an agreement to pay all moneys found to be due thereunder was then demanded by said Cherokee Nation as a condition precedent to and as part consideration for the sale by said nation to the United States of said lands; that it was accordingly provided by the fourth subdivision of article 2 of said treaty that—

"The United States shall, without delay, render to the

Cherokee Nation, through any agent appointed by authority of the National Council, a complete account of monies due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835–6, 1846, 1866, and 1868 and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation, by its National Council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States, by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress, according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its National Council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting;"

That in addition to ratifying the terms of said treaty of December 19, 1891, with some amendments not important here, it was further provided by said act of March 3, 1893, that the Secretary of the Interior, in addition to the sum of $295,736, immediately available, was authorized and directed to pay eight million three hundred thousand dollars, or so much thereof as may be necessary, to the Cherokee Nation for all the right, title, interest, and claims which said nation of Indians may have in and to the lands described in said treaty, and commonly known and called the "Cherokee Outlet," said sum to be payable in five equal annual installments, commencing March 4, 1895, and ending March 4,

1899; the acceptance by the Cherokee Nation of Indians of any of the money so appropriated to "be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement" as amended, "and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands;" and it was also provided by said act that—

"The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated out of any money in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said Nation, as required in the fourth subdivision of article two of said agreement;"

that under the last-mentioned provision of said act Messrs. James A. Slade and Joseph T. Bender were employed by the United States Government to render the account required by said fourth subdivision of article 2 of said treaty, and thereafter under date of April 28, 1894, said Slade and Bender rendered such an account whereby it appeared that there was due from the United States to the Cherokee Nation certain moneys as follows:

"Under the treaty of 1819:	
"Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'School' fund.....	$2,125.00
"With interest from February 27, 1819, to date of payment.	
"Under treaty of 1835:	
"Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund.....	1,111,284.70
"With interest from June 12, 1838, to date of payment.	

"Under treaty of 1866:

"Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation.....	432 28
"With interest from January 1, 1874, to date of payment.	
"Under act of Congress, March 3, 1893:	
"Interest on $15,000 of Choctaw funds, applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund.....	20,406.25
"With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments;"	

that the account so stated, showing said balances due to the Cherokee Nation as aforesaid, was duly rendered to said Cherokee Nation by the Secretary of the Interior (R., 3) and was duly accepted by said nation by an act of its national council in the manner and form required by said treaty, and no suit was brought against the United States charging that said account was incorrect or unjust; but, on the contrary, the principal chief of the Cherokee Nation, by the direction of the national council, notified the Secretary of the Interior and the Commissioner of Indian Affairs of the acceptance by said nation of said accounting and requested the Secretary of the Interior to so notify the Congress of the United States and to ask for an immediate appropriation to pay the amount so stated to be due, as provided in said treaty, which request was complied with by said Secretary of the Interior; but the Congress failed to appropriate the moneys necessary to satisfy the amounts stated in said accounting to be due to said Cherokee Nation, and no part of the same has ever been paid.

So much of the act of July 1, 1902 (32 Stats., 716), under

which this petition was filed, as is supposed to have any bearing upon any of the matters in controversy in these consolidated causes is, *in extenso*, as follows:

SECTION 1. The words "nation" and "tribe" shall each be held to refer to the Cherokee Nation or tribe of Indians in Indian Territory.

SEC. 2. The words "principal chief" or "chief executive" shall be held to mean the principal chief of said tribe.

SEC. 7. The words "member" or "members" and "citizen" or "citizens" shall be held to mean members or citizens of the Cherokee Nation, in the Indian Territory.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enroll-

ment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided*, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

SEC. 64. The collection of all revenue of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under

rules and regulations to be prescribed by the said Secretary.

SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

SEC. 66. All funds of the tribe, and all monies accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this Act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall make all needed rules and regulations to carry this provision into effect.

SEC. 68. Jurisdiction is hereby conferred upon the Court of Claims to examine, consider and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this Act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment

of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time.

SEC. 74. This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

SEC. 75. The principal chief shall, within ten days after the passage of this Act of Congress, make public proclamation that the same shall be voted upon at a special election to be held for that purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by Cherokee law, and the votes shall be counted by the Cherokee national council, if then in session, and if not in session the principal chief shall convene an extraordinary session for the purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and proclamation of the result, and transmit the same to the President of the United States.

Said act of July 1, 1902, as required by sections 74 and 75 thereof was duly ratified by the Cherokee Nation at a special election held for that purpose on August 7, 1902, and such result was duly certified to the President of the United States.

The act of March 3, 1903, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June

thirtieth, nineteen hundred and four, and for other purposes" (32 Stats., 998), contains the following provisions:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi river, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: *Provided*, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive Document Numbered Three Hundred and Nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi river constitute a part of the Cherokee Nation or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in said H. R. Ex. Doc. No. 309, 57th Cong., 2d sess., is therein referred to and described as follows:

"*Resolved*, That the Attorney General of the United States is hereby requested to advise the House of Representatives, with all convenient speed, in the case of the Eastern Cherokees against the United States, whether or not the award

rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893, as set forth in H. R. Ex. Doc. No. 181, 53d Cong., 3d sess., and the findings of fact of the Court of Claims of April 28, 1902, is *res adjudicata;* to review the opinion of the Department of Justice of December 2, 1895, and advise the House of Representatives whether the reasons set forth in that opinion now constitute a valid defense for the payment of said award."

On March 10, 1903, a petition (No. 23212), entitled "The Eastern Cherokees vs. The United States," was filed on behalf of—

"about 3000 persons, more or less, all Eastern Cherokees residing for the most part in Cherokee, Graham, Swain, and Macon counties, North Carolina, some in North Georgia and eastern Tennessee, together with about 800 persons, portions of their various families, gone West, nearly all of whom have been recognized as citizens and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina" (R., 5).

The object of said petition was therein stated to be the recovery by the claimants specified from the United States of "their pro rata share" of the item of $1,111,284.70, with interest thereon, appearing in the accounting of Slade and Bender.

This petition is subscribed by Belva A. Lockwood, counselor for petitioners. An amended petition, entitled "The Eastern and Emigrant Cherokees vs. The United States," was filed by the same counselor, September 3, 1903, on behalf of "about 4500 persons, more or less, all Eastern or Emigrant Cherokees residing &c. &c. * * * and others of the same class, whose names or those of whose ancestors may be found on the rolls of 1835 and 1838" (R., 8).

In this amended petition, as in the original petition, the right of recovery in favor of the claimants therein described is limited to their pro rata share of the single item of $1,111,284.70 and interest thereon "as found by the expert

accountants, Messrs. Slade and Beuler, April 28, 1894" (R., 9).

On March 14, 1903, a further petition (No. 23214), entitled "The Eastern Cherokees *vs.* The United States and the Cherokee Nation," was filed on behalf of "those persons who were parties to the treaty of 1835–'36 (7 Stats. L., p. 479), being also those persons described in article 9 of the treaty of 1846 (9 Stats. L., p. 871) as 'those individuals, heads of families, or their legal representatives, entitled to receive' their per capita pledged by 'the treaty of 1835 and the supplement of 1836,' being all those Cherokees residing east at the date of said treaty and the supplement thereto." This petition was subscribed "Eastern Cherokees by Rob't L. Owen, attorney," and asserted the right on behalf of petitioners to recover "from the United States the sum of one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents ($1,111,284.70) or the sum of one million seven hundred and sixty-one thousand four hundred and fifty-seven dollars and twenty-seven cents ($1,761,457.27) accordingly as the court may or may not sustain the award (of Slade and Beuler) * * * with interest thereon, at the rate of five per cent. per annum, from June 12, 1838, until paid, together with interest on the income annually accruing, at the rate of five per centum per annum until paid" (R., 11–12).

As directed by the Court of Claims (R., 39), each party claimant has in some appropriate manner become impleaded with the claimants in each of the other two cases, and before the hearing below the three cases were "consolidated and brought to trial as one case without prejudice to the several rights of the parties claimant."

A general traverse on behalf the United States was filed in the consolidated causes (R., 43).

Upon the hearing in the Court of Claims the three items above described as follows:

"Under treaty of 1819:
"Value of three tracts of land, containing 1,700 acres at $1.25 per acre, to be added to the principal of the school fund..... $2,125.00
"With interest from February 27, 1819, to date of payment.

"Under treaty of 1866:
"Amount received by receiver of public moneys at Independence, Kansas, never credited to Cherokee Nation..... 432 28
"With interest from January 1st, 1874, to date of payment.

"Under act of Congress, March 3d, 1893:
"Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund..... 20,406.25
"With interest from July 1st, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments."

were conceded by the Assistant Attorney General in favor of the Cherokee Nation (R., 47), and the judgment of that court in favor of said nation, in so far as those three items are concerned, would seem to be indisputable.

The real controversy presented by this record revolves around the second item described in the report of Messrs. Slade and Bender as follows:

"Under treaty of 1835:
"Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund... .... $1,111,284.70
"With interest from June 12th, 1838, to date of payment."

which item was also adjudged in favor of the Cherokee Nation by the court below.

As to this item, the parties claimant, united in their contention that the United States is liable to pay some one or other of them. The United States denied that it was liable to pay any of them. The Cherokee Nation on its part contended in the court below that as the treaty of December 19, 1891, ratified by the act of March 3, 1893, under the fourth section of article II of which the Slade-Bender accounting was had, provided that the United States, in consideration of the cession by the nation of the "Outlet," should render to the nation "a complete account of moneys due the Cherokee Nation," and as the item of $1,111,284.70 and interest thereon, which was the basis of all the several claims of right to recover as against the United States, appeared by said accounting to be due to the Cherokee Nation, the judgment upon this and other grounds which are hereinafter set forth at length should necessarily be in its favor for the benefit of all members of the Cherokee Nation, irrespective of ancient distinctions or nomenclature. Counsel for the Eastern Cherokees, on the other hand, contended that, as the Slade-Bender accounting, in so far as this item is concerned, rested upon the treaty of 1835–36, the provisions of said treaty, taken in connection with or as explained by the terms of the treaty of 1846, should control the action of the court, and the judgment should be in favor of the so-called Eastern Cherokees for per capita distribution among themselves, to the exclusion of those members of the nation commonly known as Western Cherokees or "Old Settlers" and others.

The judgment of the Court of Claims is in favor of the nation by name upon all four items claimed.

With respect to items 1, 3, and 4 and the disposition directed by that judgment to be made of the proceeds thereof, there is no dispute at the instance of any party to this record.

Assignment of Error by the Cnerokee Nation, Appellant.

With respect to item 2, for $1,111,280.70 and interest, the Cherokee Nation contends that, the Court of Claims having found that amount to be due to the nation as such, said court was without legal power to direct the distribution thereof by the Secretary of the Interior in the manner specified in its said judgment, for the reason that such judgment in such respect was in conflict with the terms of the act of July 1, 1902, *supra*, conferring jurisdiction upon that court in the premises.

Statement of Facts and Extracts from Treaties and Legislative Enactments Bearing Thereon.

Prior to the year A. D. 1808, the Cherokee Nation of Indians was domiciled in Georgia, Alabama, Tennessee, North Carolina, and South Carolin , where they owned and possessed about 14,000,000 of acres of land. In that year deputations from the upper and lower Cherokee towns, duly authorized by their nation, went to the city of Washington, the deputies of the former to make known to the President of the United States the anxious desire of those whom they represented to engage in the pursuits of agriculture and civilized life in the country which they then occupied, and to request the establishment of a division line between the upper and lower towns, so that they might the more readily begin the establishment of fixed laws and a regular government; the deputies of the latter to make known to the President their desire to continue the hunter life, and owing to the scarcity of game where they then lived, their wish to remove across the Mississippi river on some vacant lands of the United States.

After maturely considering the petitions of both parties,

on January 9, 1809, the President answered the same, saying that—

"The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who wish to remove are permitted to send an exploring party to reconnoiter the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements which will begin at the mouths of those rivers. * * *

"When this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right."

Relying on the promises of the President of the United States, as above recited, the Cherokees who wished to remove explored the country on the west side of the Mississippi and made choice of and settled themselves down upon lands of the United States on the Arkansas and White rivers, to which no other tribe of Indians had any just claim, and subsequently sent their agents, duly empowered to execute a treaty relinquishing to the United States all their right, title, and interest to all lands which they had left, or which they were about to leave, and belonging to them as a part of the Cherokee Nation, in all of which lands, proportioned to their numbers, they had an equal right.

To the treaty of cession, which was subsequently entered into on the 8th day of July, 1817, the chiefs, headmen, and warriors of the Cherokee Nation east of the Mississippi, as well as the chiefs, headmen, warriors, and deputies of the Cherokees on the Arkansas river were parties.

By article 1 of said treaty "the chiefs, headmen, and warriors of the whole Cherokee Nation" ceded to the United States certain lands described therein, "in part of the proportion of land in the Cherokee Nation east of the Missis-

sippi river, to which those now on the Arkansas and those about to remove there are justly entitled."

By article 2 said chiefs, headmen, and warriors also ceded to the United States other lands therein described.

"By art. 4 the contracting parties do also stipulate that the annuity due from the United States to the whole Cherokee Nation for the year one thousand eight hundred and eighteen is to be divided between the two parts of the nation in proportion to their numbers, agreeably to the stipulations contained in the third article of this treaty; and to be continued to be divided thereafter in proportion to their numbers; and the lands to be apportioned and surrendered to the United States agreeably to the aforesaid enumeration, as the proportionate part, agreeably to their numbers, to which those who have removed, and who declare their intention to remove, have a just right, including these with the lands ceded in the first and second articles of this treaty.

"By art. 5 the United States bind themselves, in exchange for the lands ceded in the first and second articles hereof, to give to that part of the Cherokee Nation on the Arkansas as much land on said river and White river as they have, or may hereafter receive from the Cherokee Nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas, agreeably to their numbers. * * * And it is further stipulated that the treaties heretofore between the Cherokee Nation and the United States are to continue in full force with both parts of the nation, and both parts thereof (are) entitled to all the immunities and privilege which the old nation enjoyed under the aforesaid treaties, the United States reserving the right of establishing factories, a military post, and roads within the boundaries above defined.

"And by art. 6 the United States do also bind themselves to give to all the poor warriors who may remove to the western side of the Mississippi river one rifle gun and ammunition, one blanket, and one brass kettle; or, in lieu of the brass kettle, a beaver trap, which is to be considered as a full compensation for the improvements which they may leave, which articles are to be delivered at such points as the President of the United States may direct; and to aid in the removal of the emigrants, they further agree to furnish flat-

bottomed boats and provisions sufficient for that purpose; and to those emigrants whose improvements add real value to their lands, the United States agree to pay a full valuation for the same, which is to be ascertained by a commissioner appointed by the President of the United States for that purpose, and paid for as soon after the ratification of this treaty as practicable" (Finding of Fact No. II, R., 79–81).

February 27, 1819, a treaty was entered into between the United States and the "chiefs and headmen of the Cherokee Nation of Indians, duly authorized and empowered by said nation," the preamble of which is as follows:

"Whereas a greater part of the Cherokee Nation have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, signed the eighth of July, eighteen hundred and seventeen, might, without further delay, or the trouble or expense of taking the census, as stipulated in the said treaty, be finally adjusted, have offered to cede to the United States a tract of country at least as extensive as that which they probably are entitled to under its provisions, the contracting parties have agreed to and concluded the following articles:"

By article I the Cherokee Nation cedes to the United States the lands therein described, and the parties mutually declare "that the lands hereby ceded by the Cherokee Nation are in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their nation who have or may hereafter emigrate to the Arkansas; and this treaty is a final adjustment of that of the eighth of July, eighteen hundred and seventeen."

By article VI of said treaty it was estimated that the Cherokees who had emigrated and those who had enrolled for emigration together constituted one-third part in numbers of the whole nation (Finding of Fact No. III, R., 81).

On May 6, 1828, the United States entered into a treaty with the "Cherokee Nation of Indians west of the Mississippi," the preamble of which is as follows:

"Whereas it being the anxious desire of the Government of the United States to secure to the Cherokee Nation of Indians, as well those now living within the limits of the Territory of Arkansas as those of their friends and brothers who reside in States east of the Mississippi and who may wish to join their brothers of the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and

"Whereas it being important, not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either or both of those tribes, the parties hereto do hereby conclude the following articles, viz:"

Article 1 defines the western boundary line of Arkansas.

"ART. 2. The United States agree to possess the Cherokees and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land," all west of the western boundary of Arkansas and bounded as therein set forth, and "In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extend."

"ART. 3. The United States agree to have the lines of the above cession run without delay," and "to remove immedi-

ately after the running of the eastern line from the Arkansas river to the southwest corner of Missouri, all white persons from the west to the east of said line * * * and also to keep all such from the west of said line in future."

By article 5 it was agreed "that the United States, in consideration of the inconvenience and trouble attending the removal, and on account of the reduced value of a great portion of the land herein ceded to the Cherokees, as compared with that of those in Arkansas which were made theirs by the treaty of 1817 and the convention of 1819, will pay to the Cherokees, immediately after their removal, which shall be within fourteen months of the date of this agreement, the sum of fifty thousand dollars; also an annuity for three years of two thousand dollars, towards defraying the cost and trouble which may attend upon going after and recovering their stock, which may stray into the Territory in quest of the pastures from which they may be driven; also eight thousand seven hundred and sixty dollars for spoliations committed on them (the Cherokees), which sum will be in full of all demands of the kind up to this date," * * * and "to pay two thousand dollars annually to the Cherokees for ten years, to be expended under the direction of the President of the United States in the education of their children in their own country, * * * also one thousand towards the purchase of a printing press and type." * * *

"ART. 7. The chiefs and headmen of the Cherokee Nation aforesaid, for and in consideration of the foregoing stipulations and provisions, do hereby agree, in the name and behalf of their nation, to give up, and they do hereby surrender, to the United States, and agree to leave the same within fourteen months, as hereinbefore stipulated, all the lands to which they are entitled in Arkansas and which were secured to them by the treaty of 8th January (July), 1817, and the convention of the 27th February, 1819.

"ART. 8. The Cherokee Nation, west of the Mississippi, having by this agreement, freed themselves from the harass-

ing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and to their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States east of the Mississippi, who may desire to remove west, shall be given, on enrolling himself for emigration, a good rifle, a blanket and kettle, and five pounds of tobacco; (and to each member of his family one blanket), also a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation, and support by the way, and provisions for twelve months after their arrival at the agency; and to each person, or head of a family, if he take along with him four persons, shall be paid immediately on his arriving at the agency and reporting himself and his family, or followers, as emigrants, and permanent settlers, in addition to the above, *provided he and they shall have emigrated from within the chartered limits of the State of Georgia*, the sum of fifty dollars, and this sum in proportion to any greater or less number that may accompany him from within the aforesaid chartered limits of the State of Georgia."

Pursuant to the terms of this treaty, the Cherokee Nation, west of the Mississippi, peaceably removed from their lands on the Arkansas and White rivers, in the Territory of Arkansas, to the lands newly ceded to them in the Indian Territory. The moneys agreed to be paid to them under the fifth article have been fully paid and no claim is now made on such account (Finding of Facts No. IV, R., 81–83).

By treaty of February 14, 1833, between the United States and the "chiefs and headmen of the Cherokee Nation of Indians west of the Mississippi," a change in the boundary

lines of the lands ceded under the treaty of 1828 was agreed upon to adjust a conflict with the grant previously made to the Creek Indians, and by article 1 of said treaty of 1833 the United States, in addition to renewing its guarantee and pledge of 7,000,000 acres of land to the Cherokees, further agreed that—

"In addition to the seven million of acres of land thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend, * * * and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed."

By article 5 of said treaty it was provided that—

"These articles of agreement and convention are to be considered supplementary to the treaty before mentioned between the United States and the Cherokee Nation west of the Mississippi dated sixth of May, one thousand eight hundred and twenty-eight, and not to vary the rights of the parties to said treaty any further than said treaty is inconsistent with the provisions of this treaty now concluded, or these articles of convention or agreement."

Finding of Fact No. V, R., 83, 84.

On or about February 28, 1835, a delegation of the Cherokee Nation east of the Mississippi, having full power and authority to conclude a treaty with the United States, stipulated and agreed with the Government of the United States to submit to the Senate the matter of the amount which should be allowed to their nation for their claims and for a cession of their lands east of the Mississippi river, agreeing for themselves to abide by the award of the Senate of the United States and to recommend the same to their people for their final determination.

The Senate on March 6, 1835, by resolution, advised that "a sum not exceeding five millions of dollars be paid to the

Cherokee Indians for all their lands and possessions east of the Mississippi river."

The Cherokee delegation, after the award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty, but they declined to do so, insisting that the Senate had been misled to the injury of the Cherokees, and that the matter of said award "should be referred to their nation and there, in general council, to deliberate and determine on the subject in order to insure harmony and good feeling among themselves."

On or about March 14, 1835, a certain other delegation of Cherokees who represented that portion of the nation east, who were in favor of emigrating to the Cherokee country west of the Mississippi, but had no authority or power from the nation generally, entered into propositions for a treaty with John F. Schermerhorn, commissioner on the part of the United States, which they agreed to submit to the nation for final action and determination.

Among other things included in the draft of the proposed treaty, it was proposed that the sum of $5,000,000 should be paid to the members of the Cherokee Nation east for their lands and possessions in accordance with the above-quoted resolution or "award" of the Senate, but it was further proposed that there should be deducted from said five millions the sum of $255,000 to defray the expenses of removing the members of the nation to the west.

The proposed treaty was unanimously rejected by the Cherokee national council for the reason that the expense of removal was thereby proposed to be deducted from the fund of $5,000,000.

Finding of Fact No. VI, R., 84.

December 29, 1835, a treaty was drawn up between the United States and the "chiefs, headmen, and people of the

Cherokee tribe of Indians," which treaty is commonly called the "Treaty of New Echota."

Neither the "Western Cherokees" or "Old Settlers" nor the great body of the "Eastern Cherokees" were parties to this treaty and they at all times up to the making of the treaty of 1846 repudiated it on the ground that its execution had not been authorized by them or their representatives in council.

The small number of Cherokees east of the Mississippi who negotiated the treaty were called or styled the "Treaty Party."

It was provided, among other things, by this treaty as follows:

"ARTICLE 1. The Cherokee Nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles. But as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised 'that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river' have included and made any allowance or consideration for claims for spoliations, it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision, and if no allowance was made for spoliations, that then an additional sum of three hundred thousand dollars be allowed for the same.

"ART. 2. That as it was apprehended that the lands west of the Mississippi which the United States by treaty of May 6, 1828, and supplemental treaty of February 14, 1833, guaranteed and secured to be conveyed by patent "to the Cherokee Nation of Indians" did not contain a sufficient quantity of land for the accommodation of the whole nation on their removal west, the United States, in consideration of $500,000,

agreed to convey to said Indians by patent in fee simple a further tract of land estimated to contain 800,000 acres.

"ART. 3. The lands ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty should be included in one patent executed to the Cherokee Nation of Indians by the President of the United States.

"ART. 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as, in the opinion of the emigranting agent, are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family and, in lieu of their one year's rations, they shall be paid the sum of thirty-three dollars and thirty-three cents, if they prefer it.

"Such Cherokees also as reside at present out of the nation shall remove with them in two years west of the Mississippi and shall be entitled to an allowance for removal and subsistence as above provided.

"ART. 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, removal subsistence, and debts and claims upon the Cherokee Nation and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national fund provided for in the several articles of this treaty the balance whatever the same may be shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east, they shall also be paid for their improvements according to their approval value before their removal where fraud has not already been shewn in their valuation."

By article 16 it was stipulated that the Cherokees should remove to their new homes within two years from the ratification of this treaty.

The leaders of the treaty party who had signed the treaty of 1835 contended that the sum of $5,000,000 was not intended to include the amount which might be required to remove them.

On March 1, 1836, the President submitted to the Senate the following supplementary articles, which were adopted as part of the treaty:

"ARTICLE 1. It is therefore agreed that all the pre-emption rights and reservations provided for in articles 12 and 13 shall be and are hereby relinquished and declared void.

"ART. 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of — day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi river was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question, and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provision should be made therefor as might appear to the Senate to be just.

"ART. 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions, and of the sum of three hundred thousand dollars for spoliations described in the 1st article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed

agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims as ascertained shall be turned over and belong to the education fund.

"But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate, and if they shall approve the same then this supplement shall remain part of the treaty."

The treaty and the supplementary articles were ratified and adopted as one instrument and proclaimed May 23, 1836.

Finding of Fact No. VII, R., 86–88.

The Cherokee Indians who removed west of the Mississippi prior to May 23, 1836, were called "Western Cherokees." After the removal, under the treaty of 1835–36, of the Cherokees who had remained in the Cherokee country east of the Mississippi to the lands west of the Mississippi, the term "Western Cherokees" was no longer distinctive, and the Cherokees who had theretofore been known as such were thereafter popularly known as "Old Settlers."

The Cherokees who were domiciled east of the Mississippi river at the time of the making of the treaty of 1835–36, according to the census just then completed, were thereafter known as "Eastern Cherokees," the great body of whom subsequently, in 1838, moved to the lands west of the Mississip

Finding of Fact No. VIII, R., 88.

Subsequent to the treaty of 1828, and prior to the signing of the treaty of December 29, 1835, almost continuous efforts had been made to induce the Cherokee people east to remove to the Indian Territory, but without success. Under the provisions of said treaty of 1835 practically nothing was accomplished in such direction until the summer of 1838, when the Cherokee Nation east yielded to superior force, and, under the supervision and direction of their own leaders,

emigrated west of the Mississippi to the lands theretofore ceded to the Cherokee Nation west.

Finding of Fact No. IX, R., 88.

The sum of $600,000 provided for by the supplementary articles of the treaty of 1835–'36 was estimated to be more than sufficient to pay the cost of removal and all claims of every nature and description against the Government of the United States not otherwise provided for in said treaty, and it was therefore provided that whatever surplus might remain after removal and payment of claims should be turned over and belong to the education fund.

On July 2, 1836, Congress confirmed the action of the Senate, as evidenced by the supplementary articles of said treaty, and appropriated, according to the terms of the third supplementary article, heretofore quoted, $600,000 for the removal of the Cherokees and for spoliations.

This sum proved to be insufficient for the purposes for which it was appropriated.

The treaty of December 29, 1835, was refused recognition by the great body of the Cherokees. They protested against it through their constituted authorities on numerous occasions and refused to give it any recognition, declared it to be unauthorized by the Cherokee people and a fraud on the United States.

The (Eastern) Cherokees having made no preparations to remove, as required by the terms of the treaty of 1835, Gen. Winfield Scott, with an army of men in May, 1838, placed them in camps of concentration under military control, preparatory to their removal by force. Thereupon John Ross sought to make a treaty with the United States, but his overtures were rejected and the removal of the Cherokees by force was insisted upon by the United States, except in the alternative that the Indians would agree to remove themselves peaceably.

In the latter part of May, 1838, the President transmitted

to Congress a letter bearing date May 18, 1838, from the Secretary of War to John Ross, principal chief of the Cherokee Nation, wherein the following appears:

"If it be desired by the Cherokee Nation (East) that their own agent should have charge of their emigration, their wishes will be complied with and instructions be given to the commanding general in the Cherokee country to enter into arrangements with them to that effect; with regard to the expense of this operation which you ask may be defrayed by the United States, in the opinion of the undersigned the request ought to be granted, and an application for such further sum as may be required for this purpose shall be made of Congress."

This last communication was transmitted to Congress, and on May 23, 1838, the House of Representatives, by resolution, required a statement of the further amount necessary to pay for the removal and subsistence of the Cherokees (*ibid.*, 78). On May 25, 1838, the Secretary of War submitted an estimate to the Speaker of the House of Representatives "of the amount that would be required" to remove 15,840 Cherokees and to subsist 18,336 Cherokees, stating that the further sum necessary for this purpose was $1,047,067 (*ibid.*, 78), and on June 12, 1838, Congress appropriated this amount with the proviso that no part of it should be deducted from the $5,000,000 fund.

Finding of fact No. X, R., 88–89.

The cost of the removal of the Eastern Cherokees from Georgia to the Indian Territory, paid and expended by the United States, was $1,495,485.92, which amount was obtained as follows:

From the $600,000 appropriated July 2, 1836...	$335,105.91
From the $1,047,067 appropriated June 12, 1838.....	49,095.31
From the $5,000,000 appropriated July 2, 1836...	1,111,284.70
Total.....	$1,495,485.92

The amount of $1,111,284.70, charged against the $5,000,000 fund, as before set forth, still remains charged against that fund.

Finding of Fact No. XII, R., 90

After the removal of the Eastern Cherokees to the lands west of the Mississippi certain leaders of both the Western and Eastern Cherokees met at Illinois camp grounds, and there, on July 12, 1839, entered into an "Act of union between the Eastern and Western Cherokees," which is as follows:

"Whereas our fathers have existed as a separate and distinct nation in the possession and exercise of the essential and appropriate attributes of sovereignty from a period extending into antiquity, beyond the records and memory of man; and whereas these attributes, with the rights and franchises which they involve, remain in full force and virtue, as do also the national and social relation of the Cherokee people to each other and to the body politic, excepting in those particulars which have grown out of the provisions of the treaties of 1817 and 1819 between the United States and the Cherokee Nation, under which a portion of our people removed to this country and became a separate community (but the force of circumstances have recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured adapted to their present condition, and providing equally for the protection of each individual in the enjoyment of all his rights:

"Therefore we, the people composing the Eastern and Western Cherokee Nation, in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic under the style and title of the Cherokee Nation.

"In view of the union now formed, and for the purpose of making satisfactory adjustment of all unsettled business which may have arisen before the consummation of this union, we agree that such business shall be settled according to the provisions of the respective laws under which it

originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major-General Scott for their removal to this country shall continue in charge of that business, with their present powers, until it shall be finally closed; and, also, that all rights and titles to public Cherokee lands on the east or west of the River Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation as constituted by this union.

"Given under our hands at Illinois camp grounds this twelfth day of July, 1839.

"By order of the national convention:

"GEORGE LOWRY,

"*President of the Eastern Cherokees.*

his

"GEORGE X GUESS,

mark

"*President of the Western Cherokees.*"

On the 6th of September following, the Cherokees who had agreed upon the union adopted a constitution of government which, after reciting that the Eastern and Western Cherokees had become reunited in one body politic under the style and title of the Cherokee Nation, proceeds as follows:

"The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens, respectively, who made or may rightfully be in possession of them: *Provided*, That the citizens of the nation, possessing exclusive and indefeasible rights to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in any manner whatever to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as a citizen of this

nation shall cease: *Provided, nevertheless,* That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation, on memorializing the national council for such readmission."

At a meeting of the Cherokee people held at Tahlequah, in the Cherokee Nation, on January 16, 1840, the following declaration was made:

"Whereas a meeting of the Cherokee people was agreed on and requested by the United States agent and the assistant principal chief and others, on the 15th instant, at this place, and general notification given throughout the country to all parties whatever, requesting their prompt attendance for the purpose of ascertaining fairly and properly the sense and choice of a majority of the nation in relation to the subject of their future government; and whereas we, the people of the Cherokee Nation, having assembled under this call, and having heard, read and interpreted the act of union adopted by the Eastern and Western Cherokees, dated July, 1839, and the constitution framed by a convention composed of members from both parties in pursuance of the provisions of the aforesaid act, and being satisfied with the same, we do hereby approve, ratify, and confirm the said act of union and the constitution, and acknowledge and make known that the government based upon this act and this constitution is the legitimate government of the Cherokee Nation and of our choice, and that it has both our confidence and support.

"Done at Tahlequah, Cherokee Nation, the 16th day of January, 1840.

"J. VANN,
"*Assistant Principal Chief.*
"W. SHOREY COODEY,
"*President National Committee.*"

Notwithstanding said act of union and subsequent proceedings, there remained much bitter feeling between the Eastern Cherokees and the "Old Settlers," and violent measures were frequently resorted to on both sides to carry out their purposes. These circumstances, among others, led to

the making of the treaty of August 6, 1846 (9 Stats. L., 871), wherein it is recited that—

"Serious difficulties have for a considerable time past existed *between the different portions of the people constituting and recognized as the Cherokee Nation of Indians*, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people, against the United States;" therefore," with a view to the final and amicable settlement of the difficulties and claims before mentioned" and "to make the Eastern and Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be" (*Western Cherokees vs. United States*, 27 Ct. Cls., 36, par. 3), it is agreed, among other things, as follows:

"ARTICLE I. That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835 and in the third section of the act of Congress approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States, if the Indians become extinct or abandon the same.

"ART. III. Whereas certain claims have been allowed by the several boards of commissioners heretofore appointed under the treaty of 1835 for rents, under the name of improvements and spoliations, and for property of which the Indians were dispossessed, provided for under the 16th article of the treaty of 1835; and whereas the said claims

have been paid out of the $5,000,000 fund; and whereas said claims were not justly chargeable to that fund, but were to be paid by the United States, the said United States agree to reimburse the said fund the amount thus charged to said fund, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty; and whereas a further amount has been allowed for reservations under the provisions of the 13th article of the treaty of 1835 by said commissioners, and has been paid out of the said fund, and which said sums were properly chargeable to, and should have been paid by, the United States, the said United States further agree to reimburse the amounts thus paid for reservations to said fund; and whereas the expenses of making the treaty of New Echota were also paid out of said fund, when they should have been borne by the United States, the United States agree to reimburse the same and also to reimburse all other sums paid to any agent of the Government and improperly charged to said fund; and the same shall also form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty.

"ART. IV. And whereas it has been decided by the board of commissioners recently appointed by the President of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee Nation in particular, that that portion of the Cherokee people known as the 'Old Settlers,' or 'Western Cherokees' had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi; and whereas the said board of commissioners further decided that, inasmuch as the territory before mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi river, as well as in those occupied by themselves west of that river, which inter-

est should have been provided for in the treaty of 1835, but which was not, except in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be.

"Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, viz: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five millions six hundred thousand dollars (which investments and expenditures are particularly enumerated in the 15th article of the treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would, under such marshalling of accounts, be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one third part of said residuum, to be distributed per capita to each individual of said party of 'Old Settlers,' or 'Western Cherokees.' It is further agreed that, so far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five millions six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the 8th article of the treaty of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted. And, as it affects the settlement with the Western Cherokees, there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund; and it is hereby further understood and agreed that the principle above defined shall embrace all those Cherokees west of the Mississippi who emigrated prior to the treaty of 1835.

"In the consideration of the foregoing stipulation on the part of the United States, the 'Western Cherokees' or 'Old Settlers,' hereby release and quitclaim to the United States all right, title, or claim they may have to a common property in the Cherokee lands east of the Mississippi river, and to exclusive ownership to the lands ceded to them by the

treaty of 1833 west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included."

"ART. 9. The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835, the aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over per capita in equal amounts to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto.

"ART. 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi river had, or may have, under the treaty of 1835 and the supplement thereto.

"ART. 11. Whereas the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the West, of the Eastern Cherokees is not properly chargeable to the treaty fund, it is hereby agreed that that question shall be submitted to the Senate of the United States for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee funds, and if by the Cherokees, then to say whether the subsistence shall be charged at a greater rate than thirty-three 33/100 dollars per head; and also the question, whether the Cherokee Nation shall be allowed interest on

whatever sum may be found to be due the nation, and from what date and at what rate per annum."

Finding of Fact No. XIII, R., 90–96.

The Senate of the United States, acting as umpire under article II of the treaty of 1846, on September 5, 1850, passed the following resolution:

"*Resolved by the Senate of the United States*, That the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury.

"*Resolved*, That it is the sense of the Senate that interest at the rate of five per cent. per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid." (Sen. Journal, 31st Cong., 1st sess., p. 602.)

This amount was accordingly appropriated by Congress for that purpose by the act of September 30, 1850, with the proviso that interest be paid on the same at the rate of 5 per cent. per annum, according to a resolution of the Senate of the 5th of September, 1850. (9 Stat. L., p. 556.)

Finding of Fact No. XV, R., 96.

Under the fourth article of the treaty of 1846 the accounting officers of the United States made and prepared for settlement the account therein provided for, and the Congress on such account, by act of September 30, 1850 (9 Stats., 556), appropriated $532,782.18, which amount, with interest thereon at 5 per cent. from June 12, 1838, was thereupon paid and distributed to the Western Cherokees per capita.

Under the ninth article of the treaty of 1846 the accounting officers of the United States made and prepared for

settlement the account provided for by that article, whereby it appeared that there remained a balance due of $914,026.13, and the Congress accordingly, in addition to the amount of $180,422.76, which had been appropriated for by the act of September 30, 1850 (9 Stats., 556), pursuant to the resolution of the Senate, by the act of February 27, 1851, appropriated the further sum of $724,603.37, and said amounts were thereupon paid and distributed to the Eastern Cherokees per capita, with interest thereon at 5 per cent. from June 12, 1838.

On the 27th of November, 1851, before the payment of any money on account of either of the above-mentioned balances of $523,448.85 and $914,026.13 or the signing of any receipts by the Indians on account thereof, the Cherokee national council made a formal statement of the national claims arising, as was contended, under the treaties of December 29, 1835, and August 16, 1846, and protested against the above-mentioned settlement because of the failure of the accountants to credit therein the treaty fund with the expenses of removal.

On the 22d day of September, 1851, the western Cherokees also formulated a separate protest against the proposed settlement with them.

Both of the foregoing protests were transmitted to and received by the Commissioner of Indian Affairs during the month of April, 1852.

Finding of Fact No. XVI, R., 97–101.

By section 14 of the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1889, and for other purposes," approved March 2, 1889 (25 Stats. L., 1005), the President was authorized to appoint three commissioners to negotiate with the Indian tribes own-

ing or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and he did appoint David H. Jerome, Alfred M. Wilson, and Warren G. Sayre such commissioners.

By virtue of the authority contained in an act of the Cherokee national council, approved November 16, 1891, Elias C. Boudinot, Joseph A. Scales, Roach Young, William Triplett, Thomas Smith, Joseph Smallwood, and George Downing were duly appointed commissioners—

"To meet and enter into negotiations with the above-named commission, appointed by the President of the United States, for the cession of the lands of the Cherokee Nation west of the 96th degree of west longitude, and for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled."

By said act of Congress it was made the duty of said commissioners appointed by the President, to report all agreements resulting from such negotiations to the President, to be by him reported to the Congress at its next session, and by the act of the Cherokee council it was made the duty of the commissioners on the part of the Cherokee Nation to report all their proceedings in full to the national council for its approval and ratification.

At the outset of the negotiations between said commissioners for the purchase and sale of said lands, which were known as the "Cherokee Outlet," the commissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as "a condition precedent to any agreement for the sale of the

land" that some adjustment of such contentions should be made.

On the 19th of December, 1891, after prolonged negotiations, the commissioners above named entered into articles of agreement, by article 1 of which it was agreed that—

"The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth (100°) degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth (96°) degree west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by Executive order, dated August 10, 1860, the tract of land embraced within the above boundaries containing eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less."

By article 2 that—

"For and in consideration of the above cession and relinquishment the United States agrees:"

First. That it will remove from the limits of the Cherokee Nation as trespassers certain described persons.

Second. That a certain article of the antecedent treaty of July, 1866, should be abrogated and held for naught.

Third. That the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction in certain cases.

Fourth. That—

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835–'36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of

them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting."

Fifth. That certain citizens of the Cherokee Nation should have the right to select lands as homesteads under certain conditions; and

Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States shall pay to the Cherokee Nation, at such times and in such manner as the Cherokee national council shall determine, the sum of $8,595,736.12 in excess of the sum of $728,389.46, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas river.

Said articles of agreement were accepted, ratified, and confirmed on the part of the Cherokee Nation by an act of the national council approved January 4, 1892, and were also accepted, ratified, and confirmed on the part of the United States by act of Congress of March 3, 1893 (27 Stat. L., 640).

Prior to the acceptance and ratification of said agreement on the part of the United States, as aforesaid, the commissioners on behalf of the United States, as required by the law under which they were appointed, had reported to the President the making of the articles of agreement aforesaid, and by way of explanation said:

"As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

"The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

"Whatever that construction is, the Indian must abide by (it). There is no appeal except to Congress. Without going specifically into details the Cherokees claim that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them. They also desire to include lands as well as money, but they were induced to eliminate 'lands' from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected."

Gen. Thomas J. Morgan, Commissioner of Indian Affairs, in his report to the Secretary of the Interior on February 6, 1892, made the following explanation and comment on the fourth section of article 2, to wit:

"The fourth section of article 2 provides for an accounting between the United States and the Cherokee Nation. The work necessary to render this account will be very heavy, and much time will be necessary to properly pre-

pare the same. On this provision of the agreement the commissioners say:

"The Government has made the accounting, has kept the books, has construed the treaties. If this has been done properly no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for legal discharge of the old ones.

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it.

"In your (the Secretary of the Interior's) reference of the matter to this office you said:

"'Particular attention is called to section 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions.'

"In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation, under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this office within a reasonable time, say, about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement herewith inclosed I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose."

The report of said commissioners was, on or about February 8, 1892, referred by the Secretary of the Interior to

the Assistant Attorney General for the Interior Department "for his consideration and report upon the legality of the contract, the sufficiency of the proposed bill, and his views upon the question(s) of law relating to the subject," and on or about February 25, 1892, said officer reported thereon, saying, among other things:

"The report and agreement were referred to the Commissioner of Indian Affairs, who, under date of February 6, 1892, reported favorably on the agreement, and transmitted with his report the draft of a bill to be submitted to Congress to ratify and carry out the provisions thereof. * * * The agreement contains two articles. The first relates to the cession and the second to the consideration therefor. * * *

"The considerations for said cession, as contained in article 2, are set forth under six subdivisions. * * *

"The fourth and next provision of article 2 of the agreement requires the United States to render to the Cherokee Nation a complete accounting of all moneys agreed to be paid to the Indians or which they may be entitled to under any treaty or act of Congress since 1817. And if said accounting is satisfactory Congress shall make the necessary appropriaton to pay the same. But if the accounting is not satisfactory, then the Cherokees to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

"I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting."

All of these reports were before the Congress when it accepted and ratified said articles of agreement by act of March 3, 1893 (27 Stat. L., 641), in the following language, to-wit:

"Which said agreement is fully set forth in the message of the President of the United States, communicating the

same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the 'Cherokee Outlet;' and said agreement is hereby ratified by the Congress of the United States, subject, however, to the Constitution and laws of the United States and the acts of Congress that have been or may be passed regulating trade and intercourse with the Indians, and subject also to certain amendments thereto, as follows:

* * * (Amendments not important here.) * * *.

"And the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States; provided that the money hereby appropriated shall be immediately available, and the remaining sum of eight million three hundred thousand dollars, or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal installments, commencing on the fourth day of March eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated;"

* * * * * *

"The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement, as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands;"

* * * * * * *

"And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become, and be taken to be and treated as a part of the public domain.

Finding of Fact No. XVIII, R., 102–107.

By the same act the sum of five thousand dollars, or so much thereof as might be necessary, was appropriated to

enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement.

Thereafter James A. Slade and Joseph T. Bender were employed as experts under said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was by the Secretary of the Interior referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted was accepted by the Cherokee Nation by an act of its national council approved December 1, 1894, and no suit was there after brought by the Cherokee Nation against the United States charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its national council above referred to, notified the Secretary of the Interior of the acceptance by said nation of said account as so stated by Messrs. Slade and Bender, and requested said Secretary of the Interior to notify the Congress of the United States of such acceptance, and on the 7th of January, 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

"SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3,

1893 (27 Stats., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–'36, 1846, 1866 and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of Cherokee national council accepting such accounting.

"The Speaker of the House of Representatives."

Finding of Fact No. XIX, R., 107.

The report and accounting made by said James A. Slade and Joseph T. Bender, referred to in the foregoing findings, is in the words and figures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

"The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement [a number of demands made by the Cherokee Nation were disallowed] and the result of the finding is submitted in the following schedule:

"Under the treaty of 1819:	
Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'school' fund.....	$2,125.00
With interest from February 27, 1819, to date of payment.	
"Under the treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund.....	1,111,284.70
With interest from June 12, 1838, to date of payment.	
"Under the treaty of 1866:	
Amount received by receiver of public moneys at Independence, Kansas, never credited to the Cherokee Nation.	432.28
With interest from January 1, 1874, to date of payment.	

"Under act of Congress of March 3, 1893:

Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund.....	20,406 25
With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds held in lieu of investments.	

JAS. A. SLADE.
JOS. T. BENDER."

Finding of Fact No. XX, R., 108

Neither the whole nor any portion of the various sums with interest found and stated by the concluding schedule of the so-called Slade-Bender report to be due to the Cherokee Nation under the treaties and acts of Congress therein referred to have been paid to the Cherokee Nation or to any officer, agent, or other person acting in its behalf.

With the exception of the provision contained in the act of March 2, 1895, making appropriations for the legislative, executive, and judicial expenses of the Government, directing the Attorney General to review and report upon the conclusion of law disclosed in the account of Slade and Bender, and the passing of the provisions of the acts of July 1, 1902, and March 3, 1903, conferring jurisdiction upon the United States Court of Claims to hear and determine these causes, the Congress has taken no action whatever with respect to the said account of Slade and Bender or the amounts found due thereunder.

Acting under said direction of March 2, 1895, above referred to, the Attorney General of the United States, on December 2, 1895, addressed a communication to the Congress wherein he advised that body of his disagreement with the conclusions reached by said Slade and Bender. Said communication of the Attorney General was, on December 2, 1895, by the Congress referred to the Committee on Indian

Affairs and ordered to be printed, and the same appears in Senate Executive Document No. 16, Fifty-fourth Congress, first session, Finding of Fact No. XXII, R., 109.

CONCLUSIONS OF LAW.

Upon the foregoing facts the Court of Claims concluded as matters of law:

First. That the United States is indebted to the Cherokee Nation in the following amounts, viz:

(1.) The sum of $2,125, with interest at 5 per cent. from February 27, 1819, to date of payment;

(2.) The sum of $1,111,284 70, with interest at 5 per cent from June 12, 1838, to date of payment;

(3.) The sum of $432.28, with interest at 5 per cent. from January 1, 1874, to date of payment;

(4.) The sum of $20,406.25, with interest at 5 per cent. from July 1, 1893, to date of payment.

Second. The proceeds of so much of said judgment as pertains to the items numbered 1, 3, and 4 equitably belong to the Cherokee Nation as a political or social body, and such proceeds, less any proportion thereof which the Cherokee Nation may have contracted to pay on account of counsel fees and other expenses of this litigation, should be paid or disposed of as follows, viz:

(a.) The amount represented by item numbered three (3) for $432.28, and interest, should be paid to the treasurer o the Cherokee Nation, or to such other person or officer either of the nation or of the United States as may hereafter succeed to his duties;

(*b*.) The amount represented by item numbered one (1) for $2,125, and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the principal of the "Cherokee school fund," of which fund the United States are trustees;

(*c*.) The amount represented by item numbered four (4), for $20,406.25 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the "Cherokee national fund," of which fund the United States are trustees;

(*d*.) The amount represented by item numbered two (2) for $1,111,284.70 and interest, less counsel fees and expenses, equitably belongs to the Eastern and Western Cherokees who were parties either to the treaty of New Echota, proclaimed May 23, 1836, or the treaty of Washington, of August 6, 1846, as individuals, whether east or west of the Mississippi river, and should be paid to them or to their legal representatives by the Secretary of the Interior.

Third. Such counsel fees as may have been contracted to be paid by the Cherokee Nation in the manner prescribed by sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and such other counsel fees and expenses as may be allowed by this court pursuant to the provisions of the act of March 3, 1903, set forth in Finding of Fact No. 1, should be paid to the parties entitled to receive the same by the Secretary of the Treasury upon the making of an appropriation by Congress for the payment of the judgment in this cause.

Fourth. The cost and expenses incident to ascertaining and identifying the individuals entitled to participate in the distribution of the balance of the amount represented by item numbered two (2), and the making of the distribution thereof, should be a charge upon such balance for distribution and should be deducted therefrom.

ARGUMENT.

As to the liability of the United States to the Cherokee Nation:

First, as upon an account stated:

Second, as upon existing treaty stipulations apart from the account stated.

Prior to the year 1808 the Cherokee Nation of Indians composing a single independent tribal community, governed by chiefs, headmen and warriors, owned and possessed some 14,000,000 acres of land in the States of Georgia, Alabama, Tennessee and the Carolinas, upon which they were domiciled, and over which they roamed and hunted. The white population of those States was rapidly increasing and seriously encroaching upon the Indian lands and the fish and game upon which the Indians largely relied for subsistence was rapidly disappearing from their streams and forests.

By the agreement of 1802 between the United States and the State of Georgia, whereby Georgia ceded to the former certain territory, now forming part of Alabama and Mississippi, it was stipulated that the United States should extinguish the Indian title to lands within the State of Georgia "as early as the same can be peaceably obtained on reasonable terms," and Georgia was impatiently pressing for the fulfillment of this stipulation.

In that year, relying upon the promise of the United States to exchange lands west of the Mississippi "for a just portion of the country" which they should leave in the east, a portion of the Cherokees, subsequently (in 1819), estimated as equalling in number, one third of the whole Cherokee Nation made choice of and settled upon lands of the United

States on the Arkansas and White rivers, and subsequently through their agents, duly empowered and acting in conjunction with the chiefs, headmen and warriors of that portion of the Cherokee Nation which remained east, executed the treaty of July 8, 1817, with the United States.

By this treaty the Cherokees, acting as a whole, joined in ceding to the United States certain of their lands east of the Mississippi, "in part of the proportion of the lands east," to which the Cherokees who had removed and those who were about to remove west, were justly entitled. This exchange of lands was upon the basis of "acre for acre" according to "the just proportion due that part of the nation on the Arkansas, agreeably to their numbers." To ascertain the exact acreage to which those upon the Arkansas were entitled "agreeably to their numbers," it was agreed that a census should be taken; and to aid in the removal west the United States agreed "to furnish flat bottomed boats and provisions sufficient for that purpose."

Subsequently, by the treaty of February 27, 1819, the "chiefs and headmen of the Cherokee Nation of Indians," including both those who had removed to the west and those who remained east, in order that "the treaty between the United States and them, signed the eighth of July, eighteen hundred and seventeen, might, without further delay, or the trouble or expense of taking the census, as stipulated in the said treaty, be finally adjusted" ceded to the United States "a tract of country at least as extensive as that which they probably are entitled to, under its provisions," and the lands so ceded were accepted by the United States "in full satisfaction of all claims which the United States have on them (the Cherokee Nation), on account of the cession (of the lands west) to a part of their nation who have, or may hereafter, emigrate to the Arkansas." This treaty constituted "a final adjustment of that of the eighth of July, eighteen hundred and seventeen."

Under those two treaties the Indians who removed to the Arkansas paid their own removal expenses and surrendered for the lands west, upon which they settled, their undivided interest in the lands which they had left in the east, acre for acre. The Cherokees who remained east contributed nothing of value, either in lands or money, on account of this removal of their brothers west.

In 1828 difficulties arose with respect to the Cherokees west, by reason of settlers in the Territory of Arkansas encroaching upon their lands; and on May 6, 1828, the Cherokees west, acting through their proper authorities, made a treaty with the United States, by which they surrendered their lands on the Arkansas and White Rivers in exchange for 7,000,000 acres of other lands, all west of the western boundary of Arkansas, within specified boundary limits, and a (the) free and unmolested use of all the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States and their right of soil extend."

To compensate the Western Cherokees for "the inconvenience and trouble attending the (this) removal, and on account of the reduced value of a great portion of the lands herein ceded to the Cherokees, as compared with that of those in Arkansas which were made theirs by the treaty of 1817 and the convention of 1819," the United States agreed to pay, and did in fact, pay to the Western Cherokees after their second removal, the sum of $50,000 and an annuity for three years of $2,000 to defray the expense of recovering straying cattle, the further sum of $8,760 for spoliations, a further annuity of $2,000 a year for ten years to be used for educational purposes and $1,000 on account of the purchase of a printing press and type. The Cherokees east were not parties to this treaty, but there was recited in its preamble the anxious desire of the United States to secure to the Cherokee Nation of Indians, both those living in Arkansas and

"those of their friends and brothers who reside in States east of the Mississippi and who may wish to join their brothers of the West, a permanent home." Article 8 of said treaty also recited that in order that those Indians "yet remaining in the States may be induced to join" their brothers west, the United States in addition to certain other recited inducements would bear "the cost of the emigration of all such" and would open "good and suitable ways" and make provisions for their comfort, accommodation, and support by the way "and provide provisions for twelve months after their arrival at the agency."

At the date of this last mentioned treaty the Cherokees west had received neither lands nor money from the United States on account of their removal, except, of course, the lands west of the Mississippi for which they had fully paid by the cession of their own lands in the States east, acre for acre.

No phrase of the treaty of 1828 can fairly be tortured into a recognition by the Cherokees west, of any right or interest in their lands west of the western boundary of Arkansas on the part of those Cherokees who had remained in the east.

By the treaty of February 14, 1833, the Cherokees west, at the instance of the United States, consented to a change in the boundaries of the lands ceded to them by the treaty of 1828, and the United States, besides renewing their guarantee and pledge of the Western Cherokees of the 7,000,000 acres of land and the perpetual outlet west, also agreed to issue to said Cherokees west, letters patent "as soon as practicable for the lands hereby guaranteed."

By article 5 of this treaty it was expressly stipulated that it should not "vary the rights of the parties to" the treaty of 1828 "any further than said treaty is inconsistent with the provisions of this treaty now concluded."

The treaty of December 29, 1835, commonly referred to as the "Treaty of New Echota," was executed between the

United States and certain members of the Cherokee Nation east, who are sometimes referred to as the "Treaty party" or "Ridge party." This party was but a small minority of the nation east, and though the treaty on its face purported to have been made between the United States and the "chiefs, headmen, and people of the Cherokee tribe of Indians," it was promptly and until 1846 persistently repudiated by both the eastern and western branches of the nation.

March 6, 1835, the Senate of the United States had advised that a sum not exceeding five millions of dollars should be paid to the Cherokee Indians "for all their lands and possessions east of the Mississippi river."

Article 1, of the so-called Treaty of New Echota, provided for the cession by the Cherokee Nation of all their lands "east of the Mississippi river" and the release of all of their claims upon the United States, "in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles"—

Article 2, recited a fear that the lands west of the Mississippi guaranteed by the United States under the treaty of May 6, 1828, and supplemental treaty of February 14, 1833, "to be conveyed by patent 'to the Cherokee Nation of Indians,'" would not comfortably accommodate "the whole nation on their removal west," wherefore, the United States, in consideration of $500,000 to be deducted from the above purchase price of $5,000,000 agreed to convey to said Indians, by patent, in fee simple, "a further tract of land, estimated to contain 800,000 acres," which lands together with "the lands ceded by the treaty of February 14, 1833, including the outlet" "should be included in one patent executed to the Cherokee Nation of Indians, by the President of the United States."

By article 8 of this document the United States agreed

"to remove the Cherokees to their new homes and to subsist them one year after their arrival there." Persons and families capable of subsisting and removing themselves were to be permitted to do so and were to "be allowed in full of all claims for the same, twenty dollars for each member of their family and, in view of their one year's rations," were to "be paid the sum of thirty-three dollars and thirty-three cents" should they prefer it. Cherokees residing outside of the nation who should remove west of the Mississippi within two years thereby became "entitled to an allowance for removal and subsistence as above provided."

Article 15 of this treaty provided, "that after deducting the amount actually expended for * * * removal, subsistence * * * the balance whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed."

Article 16 required the Cherokees east to remove to their new homes within two years from the ratification of the treaty, and article 17 provided that

"all stipulations in former treaties which have not been "superseded or amended by this, shall continue in full force "and effect."

Before the ratification of this treaty by the Senate the attention of the Indians was drawn to the inclusion of the word "removal" in article 15 thereof, and they immediately protested that such inclusion was erroneous and contrary to their understanding of the bargain, and thereupon, the President, on March 1, 1836, submitted to the Senate, for its consideration, supplementary articles, the second of which recited that the Cherokees had supposed that the sum of $5,000,000 fixed by the Senate as the value of the Cherokee lands and possessions east of the Mississippi, "was not intended to include the amount which may be required to remove them" * * * which suggestion has been confirmed by the opinion expressed to the War Department by

some of the Senators, who voted upon the question" and the President is willing that "if it was not intended by the Senate that the above mentioned sum of five millions of dollars should include the objects herein specified, that in that case such further provision should be made therefor, as might appear to the Senate to be just." The third of said supplementary articles read in part as follows:

"It is, therefore, agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people *to include the expense of their removal* * * * This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund."

The treaty as originally drafted and including these supplementary articles was ratified and adopted as a single instrument by the Senate and proclaimed May 23, 1836. This treaty is sometimes referred to as the treaty of 1835–1836.

Pursuant to the third article of the supplementary articles, above referred to, the Congress on July 2, 1836, appropriated the sum of $600,000 to be expended as therein provided, and it being the then understanding that this amount would more than pay for spoliations and the cost of removal, it was provided that any surplus which might remain after payment of such expenses should be applied to the national educational fund. It very shortly transpired that the estimate of cost of removal had fallen far short of the reality, and that although prior to 1838 but a small body of the Indians east, scarcely 2,000 in number, had been induced to remove west the $600,000 had become greatly depleted by the expenses incident to such removal. When preparations were begun in May, 1838, by the Government, to compel the removal of the Indians to the west by the use of military force, the House of Representatives made inquiry of the Executive Department as to the probable additional amount

which would be necessary to defray the removal expenses of the remaining Cherokees to the west, and on May 25, 1838, the Secretary of War advised Congress that in his view the further sum of $435,900 would be required for such purpose, and if it was intended to pay to the Indians subsistence for one year after their arrival in the west the further sum of $611,147.00, should be added thereto, making a total of $1,047,067.00, and on June 12, 1838, the Congress appropriated the full amount so estimated by the Secretary of War, the same to be "in full for all objects specified in the third article of the supplemental articles of the Treaty of 1835" and "for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of said sum of money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty.

It was undoubtedly to these two appropriations, already made, that General Scott referred when on August 1, 1838, in response to the proposal of the Cherokee delegates to undertake the removal of said Indians to the west at an estimated expense of $66.24 per capita, he replied to said delegates that the estimate was extravagant, and "the whole expense of the emigration is to be paid out of the appropriations already made by Congress, the general surplus of which is to go to the Cherokee Nation in various forms," and on August 2, 1838, after the delegates had adhered to their estimates "with a slight increase for soap," he again wrote, "as the Cherokee people are interested in the expense as well as the comfort of the removal I do not feel myself at liberty to withhold my sanction."

The deduction which the learned Assistant Attorney General seeks to draw from the correspondence with General Scott in this connection and his deposition subsequently given thereabouts, to the effect that the Cherokees distinctly understood that the expense of the removal was to be borne by them and if it exceeded the amount specifically appropri-

ated for that purpose was to be deducted from the so-called treaty fund, is a *non sequitur*, for it does not appear that the Indians had ever been advised that the appropriation of $600,000 had been practically exhausted or that the total cost of the removal, at the estimated per capita of $66.24, would not in fact fall within the total of the two sums appropriated as above for that purpose. In any event, if the treaty itself, including the supplementary articles, operated as an agreement on the part of the United States to pay the expenses incident to the removal west, the mere fact that the Congress appropriated an insufficient sum for that purpose, irrespective of whether the contracts for the removal were in fact made judiciously or otherwise, would not operate to change the practical relations of the parties under the provisions of the treaty itself unless the intention to alter the terms of the treaty was evidenced by conditions equal in solemnity to those which surrounded the making thereof.

The total cost of the removal of all Eastern Cherokees to the west was $1,495,485.92, an amount distinctly less than the sum of the $600,000 and the $1,047,067.00 appropriated July 2, 1836 and June 12, 1838, respectively, for this among other purposes, and notwithstanding the fact that the appropriation of $1,047,067.00 of July 12, 1838, contained the specific item of $435,900.00 for the specific purpose of removal, but $49,095.31 was drawn from that appropriation for such purpose, and but $335,105.91 was drawn from the $600,000 appropriation of July 2, 1836, while the enormous sum of $1,111,284.70, necessary to defray the balance of the removal expense, was deducted from the $5,000,000 agreed to be paid to the Indians for their lands and improvements.

With this grievance fresh upon them and at a time when the attention of the Indians had been sharply drawn to the possibility of the United States attempting to make the treaty fund bear the expense of removal, the two branches of the Cherokee people acting through their high executive

officers entered into an "Act of Union between the Eastern and Western Cherokees" on the 12th day of July, 1839, (erroneously reads 1838 on pages 1 and 91 of the Record,) whereby "The people composing the Eastern and Western Cherokee Nation, in national convention assembled," solemnly agreed "to form themselves into *one body politic under the style and title of the Cherokee Nation*," and further declared that in view of the Union now formed "*all rights and titles to public Cherokee lands on the east or west of the River Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from other sources, shall hence forward vest entire and unimpaired in the Cherokee Nation as constituted by this Union.*" By the constitution adopted on the 6th of September, 1839, by the Cherokees who had also agreed upon the Union, it was declared that "*The Eastern and Western Cherokees* had become reunited *into one body politic* under the style and title of the Cherokee Nation," and that "the lands of the Cherokee Nation shall remain common property," and at a meeting of the Cherokee people held at Tahlequah in the Cherokee Nation, on January 16, 1840, it was publicly declared that "the people of the Cherokee Nation having assembled under this call" * * * "do hereby approve, ratify and confirm the said Act of Union and the Constitution and acknowledge and make known that the government based upon this act and this Constitution is the legitimate government of the Cherokee Nation and of our choice, and it has both our confidence and our support."

Thereafter, many disputes arose between factions within the Cherokee Nation, and much rioting and disorder resulted therefrom; as the result of which the United States on August 6, 1846, entered into a treaty with delegates representing the former bodies of the Eastern and Western Cherokees whereby it was recited that serious difficulties had theretofore

existed between the different portions of the people now "constituting and recognized as the Cherokee Nation of Indians," and that "certain claims existed on the part of the Cherokee Nation and portions of the Cherokee people against the United States," and with a view to the settlement of these claims and to the making of "the Eastern and Western Cherokees parties to the Treaty of New Echota, which they had never conceded themselves to be," it was agreed by article one thereof, "that the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit;" and by article IV it was declared,—and by assenting thereto the Indians themselves for the first time recognized the suggestion as well founded—that the Western Cherokees by the Treaty of 1828 did not acquire exclusive title to the territory ceded to them by that treaty, but that said lands were "intended for the use of and to be the home for, the whole Nation," and that by "the equitable operation of the same treaty, the Western Cherokees acquired a common interest in the lands occupied by the Cherokees east of the Mississippi, which interest should have been provided for in the Treaty of 1835, but it was not, except in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of that interest, whatever it may be, and a method of ascertaining such value was prescribed. In consideration of the payment of the sum thereby ascertained to be due the Western Cherokees quit-claimed to the United States all right and title which they had in and to the lands east and their claim to exclusive ownership in the lands west, it being further provided in said article, that the lands west of the Mississippi, including the 800,000 acres of additional lands ceded by the United States under the Treaty of 1835, should "be and remain the common property of the whole Cherokee

people." Article 9 of said treaty, evidenced the agreement of the United States "to make a fair and just settlement of all moneys due to the Cherokees and subject to the *per capita* division under the treaty of 29th, December, 1835," provided a method for ascertaining the amount so due, and provided for its payment *per capita* to "those Cherokees residing East at the date of said treaty and the supplement thereto."

In each case in ascertaining the amount due and to be paid over to the Indians, it was provided by the methods of settlement adopted by the treaty that expenses of removal and subsistence should be credited to the United States, and the settlements were made upon such basis, but by article 11 of the treaty the question as to whether the cost of subsistence should be borne by the Indians "and also the question whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date, and at what rate per annum" was submitted to the Senate of the United States for its decision. Upon this submission the Senate, acting as umpire on September 5, 1850, passed a resolution, declaring in effect that the cost of subsistence had been improperly deducted from the treaty fund and that it was

"the sense of the Senate that interest at the rate of five per cent. per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid." (Sen. Journal, 31st Cong., 1st sess., p. 602.)

Thereupon the accounting officers prepared for settlement the accounts provided for by the fourth and ninth articles of said Treaty of 1846 from which it appeared that there was due from the United States to the Western Cherokees the sum of $532,782.18, and to the Eastern Cherokees the sum of $914,026.13, and these amounts together with interest thereon at the rate of 5 per centum per annum from June 12, 1838, were appropriated by Congress by the Acts of September 30, 1850, and February 27, 1851, respectively, and

said amounts were properly distributed to the Eastern and Western Cherokees *per capita.*

Prior to the making of any distribution of either of said amounts, the Cherokee National Council made a formal statement of the national claims arising under the Treaties of 1835 and 1846, and protested against the above mentioned settlement accounts, because, among other reasons given,

"no allowance is made for the sums taken from the treaty fund for removal to the west, although that charge depended on precisely the same words in the Treaty of 1835 as did the one year's subsistence, and the Senate unanimously decided on the question submitted to them as arbitrators that the item of subsistence was not a proper charge upon the Cherokee fund." (R., 98.)

Afterwards the amounts with interest as appropriated by Congress were distributed *per capita*, to and receipted for, by both the Western and Eastern Cherokees, individually, in full of all demands under the Treaty of August 6, 1846, according to principles established in the fourth and ninth articles thereof, respectively; but the Cherokee Nation upon the payment of said money did not execute or deliver to the United States a full and final discharge for its demands upon the United States, under said treaty, although required so to do, by the Act of February 27, 1851, making appropriation for the amount due to the Eastern Cherokees *per capita.*

Subsequently, and notwithstanding the receipts in full, and final discharges signed as aforesaid, the Western Cherokees, by the Act of February 29, 1889 (25 Stats., 694), were authorized to bring suit in the Court of Claims for a further balance alleged to be due to them upon the treaty stipulations; and upon appeal to this court, the further sum of $216,556.20, with interest on $212,376.94 thereof, from June 12, 1838, at 5 per cent. was adjudged to be due to them and the total amount was subsequently appropriated and paid.

By article 15 of the Treaty of 1866, between the United States and the Cherokee Nation, provision was made for the settlement by the United States, "on the unoccupied lands east of the 96th meridian, west longtitude" and within the Cherokee country, of civilized Indians, friendly with the Cherokees, upon payment in the event of the surrender of their tribal relations, "unto the Cherokee national fund a sum of money" proportioned upon the numbers which the "tribe so settled bore to the entire number of the Cherokee Nation;" it being further stipulated that if the Indians so settled desired to preserve their tribal relations, they should not only contribute, in like manner to the national fund, but should also pay for the lands allotted to such tribe. Under this provision, by virtue of agreements made between them and the Cherokee Nation, the Delawares, Shawnees, Poncas, Nez-Perces, Otoes, Missourias and Pawnees, were located upon the lands of the Cherokees and paid to the latter the varying amounts provided for thereby.

From November, 1851, to June 30, 1889, nothing was done upon the part of either the Cherokees, or the United States, which tended to alter in any aspect their relative attitudes towards the claim of the former against the latter for the sum of $1,111,284.70 and interest thereon from June 12, 1838, until paid. In addition to this item the Cherokee Nation had from time to time assiduously pressed other claims against the United States, arising out of other treaty stipulations and under acts of Congress.

Upon the last mentioned date, the Congress authorized the appointment of Commissioners to negotiate with the Indians for the cession to the United States of their title or interest in the lands lying west of the ninety-sixth degree of longitude in the Indian Territory, and on November 16, 1891, the Cherokee National Council authorized the appointment of commissioners to meet and enter upon such negotiations with them.

At the outset of the negotiations "the comissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as "a condition precedent to any agreement for the sale of the land, that some adjustment of such contentions should be made." (R., 103.)

As a result of such contentions and demand, provision was made by the second article of the agreement of December 19, 1891, for the rendition by the United States to the Cherokee Nation of "a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835-36, etc.," and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and it was further provided in said article, that if it should appear "upon such accounting, that any sum of money has been (so) withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting." (R., 103-104.)

It was further provided in said paragraph that if the Cherokee Nation when said accounting had been rendered should conclude that such accounting was incorrect or unjust, then it should have the right within twelve months after such rendition "to enter suit against the United States in the Court of Claims * * * for any alleged or declared amount of money promised, but withheld by the United States from the Cherokee Nation * * * which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in said accounting." * * *

The articles of agreement containing the above among other stipulations were accepted and ratified on the part of the Cherokee Nation, January 4, 1892, and on the part of the United States by the Act of Congress of March 3, 1893, (27 Stats., 640) which, in addition to ratifying said agreement appropriated the sum of $5,000 "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article two of said agreement."

How would it be possible to more definitely provide for the stating of an account covering a series of past monetary transactions between the parties, or to more certainly promise to pay any balance which upon such accounting might be found to be due from the United States on the one part to the Cherokee Nation on the other.

What more perfect example of the true definition of an account stated could be imagined than was presented by the account prepared by Messrs. Slade and Bender, under the supervision of the Commissioner of Indian Affairs and the Secretary of the Interior, and thereafter in strict accord with the requirements of the Act of March 3, 1893, rendered to the Cherokee Nation, through its accredited representative and after full examination by formal vote of its national council accepted by said nation as correct. That the obligation of the United States to pay the amount shown on the account so stated and rendered to be due to the Cherokee Nation became absolute when the nation formally notified the Secretary of the Interior of its acceptance, accompanied with the request that he should so notify the Congress and ask for an appropriation to cover the amount admitted to be due, would seem to be beyond dispute.

The fact that by the act providing for the accounting, there was reserved to the nation the right in the event of dissatisfaction with the accounting upon its part to apply

to the courts for an adjudication of its contentions, does not militate against the claim that the transaction between the parties constituted an account stated, in which all prior transactions and claims became merged, and which subject to impeachment only upon the ground of fraud or mistake fastened upon the United States the obligation to pay the balances shown to be due. In every instance of an account stated it must affirmatively appear that the balance shown was mutually arrived at, as by *insimul computassent*, or that the account prepared and rendered by one was either expressly or impliedly assented to or accepted as correct by the other. In such case the law, when necessary, will imply a promise to pay the balance shown by the account to be due from the one to the other, but where as here, the debtor, in advance, expressly agrees to pay such amount as upon its own showing will be found to be due to the creditor all question as to both the obligation and the duty to pay would seem to disappear.

A curious misapprehension seems to have prevailed in the court below as to what in law constitutes an account stated. It is not a fact as is suggested in one of the majority opinions that in such case the account must be presented by the creditor and accepted by the debtor, nor is it true that the doctrine of account stated is only applicable to dealings with or between merchants, nor is it true that in the case at bar the account sued upon "was merely rendered" as contradistinguished from rendered and accepted. The account here sued upon was rendered by the party stating it to the other party to the transactions covered by it, who expressly accepted it as correctly stating their respective rights and obligations.

An account stated is defined to be an agreement between persons who have had previous transactions fixing the amount due in respect of such transactions.

In such case the law will imply a promise to pay the bal-

ance shown thereby to be due, and an express promise to pay is not necessary.

Trueman *vs.* Hurst, 1 Term Rep., 40; Lord Mansfield.

It is not necessary that there should be cross or mutual demands. The defendant's acknowledgment of a sum due from him to the plaintiff, need not relate to more than a single debt or transaction,

2 Chitty on Contracts, 11 Am. Ed., p. 962.

It is not necessary that the agreement should be signed by the parties and it may have been rendered by the debtor to the creditor.

Toland *vs.* Sprague, 12 Peters, 300.

As said by Mr. Justice Barbour, speaking for this court in the last cited case (p. 334):

"We agree that the mere rendering of an account does not make it a stated one; but that if the other party receives the account, admits the correctness of the items, claims the balance or offers to pay it as it may be in his favor or against him, then it becomes a stated account. The plaintiff having received it, having made no complaint as to the balance or the items, but on the contrary having claimed that balance, thereby adopted it, and by his own act treated it as a stated account;"

An I. O. U. in defendant's handwriting, not addressed to any one but produced by plaintiff is *prima facie* evidence of an account stated with him; Douglass *vs.* Holme, 4 P. & D., 685 and is conclusive upon the parties unless the defendant affirmatively shows fraud or mistake,

Philips *vs.* Belden, 2 Edwards Chancery, p. 1.

It is as if a promissory note had been given for the balance,

Loventhal *vs.* Morris, 103 Alabama, 336.
Bass *vs.* Bass, 8 Pickering, 187.
Dunhon *vs.* Griswalk, 100 New York, 224.
Comer *vs.* Way, 107 Ala., 300; 54 Am. St. Rep., 95.
Wharton *vs.* Anderson, 28 Minnesota, 301.
Lockwood *vs.* Thorne, 11 New York, 170; 62 Am. Dec., 81 and note.
Laycock *vs.* Pickles, 4 B. & S., 497; 1 Eng. Ruling Cases, 425.

This case differs in all essential particulars from that of Nutt *vs.* United States, 125 U. S., 650, where the account stated by the quartermaster-general was not submitted to the claimant as a correct statement of indebtedness, nor was there any promise to pay such amount, either express or implied.

In the case at bar the account is not attacked upon the ground of fraud or mistake. The defense revolves around an attempt to litigate an item once settled and agreed upon between the parties, without a shadow of pretense that there was anything unfair in the settlement, or any misapprehension in regard to it. The consideration for the rendering of the account sued upon viz. the vast domain of the Indians passed from the Cherokee Nation to the United States in 1893 and no suggestion by the latter of restoring the *status quo* is heard from any quarter. What a mockery did the fourth subdivision of article II of the Agreement of 1891 constitute if the contention of the learned Assistant Attorney General thereabouts shall prevail.

His copious argument upon the proposition that the accountants exceeded their authority, in construing for themselves the terms of the various treaties and statutes specified in said article, and applying the same to the figures evidenc-

ing receipts and expenditures as found in the books of account in order that the promise of the United States to render a just accounting of the transactions between it and the Indians, growing out of said treaties and statutes, might be kept to the hope as well as to the ear, fades away, dissolves and disappears when tested by the terms of the agreement of 1891, and the Act of 1893, themselves. It is no better bottomed than is the suggestion to be found in the concurring opinion of one of the justices of the court below, that in finding the United States to be indebted to the Cherokee Nation in the amount of the item here in question, the accountants had but proceeded upon the *assumption* that the United States were to pay removal expenses without warrant of law therefor, although the same learned justice reviewing the self same treaties reaches the self same conclusion without recourse to any assumptions whatever.

It seems to be but fair to the accountants and to the Secretary of the Interior who accepted and by his acts at least impliedly approved their report to say, that in no just sense can their conclusions be said to depend upon *assumptions*, either of law or fact, although at one point in their elaborate report in the course of discussion the word "assumption" is used (p. 25). The inference and argument which is sought to be deduced from such use of the word is completely negatived by the continued perusal of the discussion of the same items of account appearing elsewhere in their report.

The suggestion that it was intended by the Congress when it appropriated the $5,000 in 1893 "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to *properly* render a *complete* account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article two of said agreement," that the activities of such "expert persons" should be limited to reproducing the accounts in the precise form in which they then

stood upon the account books of the Government is equally without foundation. It may reasonably be contended that the Indians themselves could have produced from their own sources such a transcript of the accounts, as they had been actually kept. If nothing more than the reproduction of the many accounts in convenient form was intended, copyists and not "expert persons" would doubtless have been specified by the appropriation act. The fourth paragraph of article 2 of the agreement of 1891 stipulates not for a transcript from the account books, but it expressly provides for the rendering of "a complete account of moneys due the Cherokee Nation" under the treaties and acts of Congress therein specified.

Upon the theory of accounting adopted by the Government accountants prior to 1903, everything due to the Indians had been paid to them and their receipts and discharges in full based upon such theory reposed in the Department of the Interior. It is true that the "expert persons," Slade and Bender, might have adhered to the theory of accounting theretofore adopted if upon examination they had found it to be correct, but in that case the Indians had the reserved right to resort to the Court of Claims to dispute the result; but the act of 1903 distinctly recognized the possibility of such accountants departing from the theories and views of those who had theretofore settled the accounts with the Indians, for it provided that "if it shall be found upon such accounting that any sum of money has been" withheld, the amount should be appropriated by Congress, payable to the Cherokee Nation.

The contention of the Indians had all along been that upon a proper interpretation of the treaties they should not be charged with the item for removal expenses. Unless the "expert persons" were intended and expected to re-examine and reconstrue the treaties in question for themselves how could it be ascertained whether such contention was correct?

The parties to the agreement of 1891 clearly understood that the account therein provided for was only to be stated and rendered after a re-examination of the terms of the treaties themselves. The commissioners on part of the United States voicing this understanding, when reporting to the President, said:

"The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government. * * * The Cherokees claim that upon a just accounting, *upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found to be due to them.* * * * The Government has made the accounting, has kept the books, *has construed the treaties. If that has been done properly,* no harm can come from restating the account. *If it has not been done properly, no possible reason can exist why the error should not be corrected*" (R., 104).

This report was before the executive officers of the Government and the Congress when the act of March 3, 1893, above referred to, was enacted.

Messrs. Slade and Bender, in reviewing the treaties in question and restating the accounts long before settled in the light of such review, did only what the Secretary of the Interior, the Congress, and the Cherokee Nation intended and expected them to do.

It is not necessary to dispute as to whether the liability of the United States to the Cherokee Nation with respect to the item here in controversy depends upon an account stated, or upon an award or upon a contract of sale to recover purchase money owing for lands conveyed. Each hypothesis would be sufficient to support more or less convincing arguments tending to compel the affirmance of the judgment of the trial court.

But the determination of such questions is not essential to the decision of this case. This suit proceeds upon the

express promise of the Government to pay a sum to be ascertained in the manner specified, the consideration for which promise the Government has received and enjoyed. Whether the manner specified for ascertaining the sum contracted to be paid, shall be called an arbitration or an account stated, cannot affect the validity nor the binding quality of that contract. If the Slade and Bender report did not create an express obligation to pay the amount found to be due, it at least, ascertained and fixed the amount to be paid under an existing express contractual obligation.

The particular nomenclature is immaterial. The conclusiveness of the settlement of 1893 is apparent. It cannot be denied that, at the time of the negotiations of 1891, there was, and for many years had been a controversy between the United States and the Cherokee Nation with regard to amounts of money claimed by the nation and disputed by the United States.

Therefore, before the nation would part with its lands it demanded as a condition precedent thereto, that there should be a settlement of the differences and payment of such amount as might be found due. The United States acceded to this demand and agreed to submit its own accounting and to pay such sum as might be shown to be due thereby.

The United States accounted to the Cherokee Nation through its proper agent. The Cherokee Nation through its council and chief accepted, and so advised the Interior Department, and this department in turn reported the conclusion of the entire transaction to Congress for action. Could the agreement and its results have been more exhaustive, regular or conclusive?

A. says to B.: "You claim certain sums from me; I dispute some or all of them; you have certain lands which I want to buy, and which you decline to sell; I will agree to pay you a certain sum of money for these lands, and will agree further to render you a statement of what I think I owe you, you to have the right to accept my statement, or

to appeal to the courts for final adjudication." B. accepts the offer, conveys the land, takes his money, and awaits the statement. In due time the statement is rendered, and B. accepts it. Would a court hesitate to enforce the payment of that demand? Would a court permit further inquiry, upon any ground, to either party? Has not the demand with all its history and contention, been determined by this final action? The land was sold for so much money, and for the right and privilege to have a statement submitted for acceptance, or investigation by the courts, as the claimant might elect.

Here lies the consideration. The privilege to have this statement made with the right to accept or reject, was bought, and the acceptance of the statement is as conclusive as the acceptance of an offer can be made. The mutuality of the bargain is perfect, and there is no escape from its consequences. This was not a mere reference for decision, it was a contract based upon consideration to render a statement of obligation, subject to acceptance, coupled with a promise to pay, if accepted.

This is precisely the situation between the United States and the Cherokee Nation in this case with this exception, that the United States occupies the position of a guardian and the Cherokee Nation that of a ward; and if anything can be added to the sanctity of a contract, the obligation on the part of the United States to abide by the consequences of this particular bargain, is correspondingly increased.

The Cherokee Nation, by the agreement of 1891–1893, surrendered to the United States all of its title and interest in and to the vast domain therein described. The United States accepted the cession and entered upon and now maintains possession of the estate, and by all known rules of law and equity are doubly bound to pay in full the consideration which, as the agreed purchase price, they promised to pay.

The United States, having entered into possession of the lands sold, cannot refuse to perform in full and according to the letter the obligations which it assented to and which were imposed upon them by the terms of the instrument of sale.

In all essential features the transaction of 1891–1893 was, if possible, more binding than an account stated. It embodied every element of a present contract of sale. There were parties, the object of barter, and an express promise to pay a definite consideration therefor.

With regard to this the Court of Claims, through Mr. Chief Justice Nott, says:

"In the opinion of the court this case is simply one to recover purchase-money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be delivered until the purchase-money is paid, or secured, or, at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase-money should be paid soon. But, nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase-money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a case of sale and delivery and non-payment of the purchase-money for the thing sold and delivered."

It seems difficult to conjure up objections to the obligations of the United States to pay the amounts contained in the Slade and Bender statement, adopted and reported by the Interior Department, and accepted by the Cherokee Nation.

What was disallowed, the nation has lost. What was allowed, belongs to the Cherokee Nation. When resolved into its essential elements, every requirement of the rules of contract has been complied with except that of payment to discharge the amount due.

To say that Congress wished to provide for an accounting which would bind neither party, which would adjust nothing, is to say, that it meant to do a useless and senseless thing, or that it was its purpose to inveigle the Indians into parting with their lands upon the strength of a promise never intended to be kept. Neither can be attributed to Congress. To say that the finding was not to be conclusive would be entirely inconsistent with the alternative clause giving the Cherokee Nation the right to sue. If the accounting was not to merge into itself the matter of difference, if it was to be impotent, then there was no reason for its incorporation and the clause relative to the suit should have been the only provision.

Nor can it be said that the refusal of the Government to pay in this case is unusual or should be in any sense accepted as the assertion of a right to which it regards itself fairly entitled. It is an ordinary case of an ordinary wrong in dealing with the Indians. One of the most caustic expressions found in judicial comment is the language of Chief Justice Marshall, who, speaking of this tribe, said:

"A people once numerous, powerful and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath, our superior policy, our arts and our arms, have yielded their lands by successive treaties each of which contains a solemn guarantee of the remainder."

Due "regard to the honor and justice of a great Republic alike forbid the imputation of a desire that its legislation should be so construed and its law so administered" that the Cherokee Nation of Indians should be deprived of the fruits of the settlement clause of the agreement of 1891-1893.

INTEREST.

Upon the basis of an account stated, the affirmance of the judgment of the court below as to principal necessarily requires the affirmance of the allowance for interest; for the account, which was submitted by the United States to the Cherokee Nation as a correct statement of indebtedness admitted to be due from the former to the latter, admitted liability for interest. It is of no consequence that the failure of the debtor to pay what was long ago admitted to be due has resulted in so swelling the interest account that it exceeds in importance and amount the sum of the principal itself. The admission by the United States of liability to pay interest from the dates upon which the respective principal amounts therein specified fell due was part and parcel of the account itself as rendered and accepted by the Cherokee Nation, and as subsequently reported to the Congress by the Secretary of the Interior for an appropriation. It was included within the express promise on the part of the United States to pay to the Cherokee Nation any sum found upon such accounting to have been improperly withheld. If the account had not contained an express admission of liability upon this point, it is not too much to assume that the Cherokee Nation would not have abandoned the privilege accorded to it by the act of 1893 to resort to the Court of Claims within twelve months from the rendition of the account to have the question of its right to receive interest upon such account determined, for by the eleventh article of the Treaty of 1846 it is expressly recited that the Indians had claimed interest upon "whatever sum may be found to be due the nation," and that the question was left to the Senate as umpire to determine, first, whether interest should be paid, and, second, if so, "from what date and at what rate per annum" (R., 96).

The Senate, so acting as umpire, on September 5, 1850,

"*Resolved*, That it was the sense of the Senate that interest at the rate of five per cent. per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, (who together at that time constituted the Cherokee Nation) from the twelfth day of June, eighteen hundred and thirty-eight, until paid."

And the Congress thereafter, by numerous acts appropriating moneys to be paid to Cherokees on various accounts, confirmed and gave countenance to the Senate's award upon this point.

See Act of Sept. 30, 1850, 9 Stats., 556; Act of Feb. 27, 1851, 9 Stats., 572.

Prior to the rendition of the Slade-Bender account, the question of the propriety of allowing interest upon certain claims of the Cherokees arising out of the Treaty of 1835 and prior years had been the subject of consideration by this court and had been resolved in favor of such allowance.

U. S. *vs.* Western Cherokees, 148 U. S., 178.

In 1893, when the United States undertook to render the accounting now in question, the amount of interest claimed already exceeded the amount of the principal debt. In the negotiations which culminated in the agreement of 1891 the Cherokee Nation, as appears from the report made by the Commissioners on behalf of the United States to the President prior to the passage of the act of March 3, 1893, insisted "that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal *and interest*, will be found to be due them. They also desired to include lands as well as money, but they were induced to eliminate lands from the provision. With that eliminated the provision was agreed to as set out." It thus appears that at the time of the entering upon the agree-

ment to render the account, and at the time of the rendition itself, both the Cherokee Nation and the legislative as well as the executive branches of the United States Government fully understood that one of the main items, if not the main item, for the payment of which the Cherokee Nation was contending, was the item of interest accrued upon various principal sums, and so when the United States, rendering the account in its own way, through its own instrumentalities, deliberately and in unmistakable terms admitted its liability to pay interest upon the principal sums which were also thereby admitted to be due and payable, it would seem that in the absence of fraud or mistake, neither of which are shown to have intervened here, such admission as to interest, solemnly accepted and acted upon by the Cherokee Nation, should be treated as binding and of equal force and dignity with the admissions concerning the obligation on the principal sums themselves. The agreement to pay interest upon the principal sums found to be due was as much a part of the consideration for the sale of the Indian lands as was any other portion of the purchase price.

But learned counsel for the United States suggest that although the general liability of the United States to pay interest upon the specified sums was admitted by the account, nevertheless, as the account did not in express terms specify the rate per cent. at which such interest was payable, the Court of Claims had acted without proper foundation in ascertaining and decreeing that interest should be paid at the rate of 5 per cent.

This suggestion is, to say the least, inconsistent with the twice-made concession on the part of the same learned attorney, that the action of the Court of Claims allowing interest upon the three smaller items was proper, for the right to interest in each of such instances depends upon the findings of the account stated in words identical with those which declare interest to be payable upon the item of $1,111,284.70. It is

not true that the accountants in their report do not at any point specify the rate at which interest is to be paid. In the course of discussing the treaties of 1835 and 1846 and the various demands of the Indians founded thereon, the accountants refer to the report of Mr. Jarnigan of February 19, 1847, from the Committee on Indian Affairs, wherein it was

"*Resolved*, That in the opinion of the Senate, whatever balance of the fund of $5,000,000 stipulated to be paid to the Cherokee Nation by the treaty of 29th December, 1835, and the subsequent additions thereto may now be ascertained to be due to said Cherokee Nation, shall bear an interest at the rate of five per cent. per annum from the time found due until same be paid by the United States."

It is quite true that the accountants do report that "no action appears to have been taken upon these resolutions" (p. 18), but upon the general principles involved the accountants adopt the views of this report and at no place indicate any dissent therefrom either on the score of allowing interest at all or upon the rate per cent. mentioned.

Express reference was made in the report to the act of September 30, 1850, which rested upon the Senate resolution of September 5, 1850, *supra*, whereby there was paid to the Indians the amount deducted from said five-million-dollar fund for subsistence, together *with interest thereon at the rate of five per centum per annum from* 1838 *to date of payment*, and the accountants must be assumed to have had in mind both section 2096 of the Revised Statutes of the United States, declaring that—

"The Secretary of the Interior shall invest in a manner which shall be in his judgment most safe, and beneficial for the fund, all moneys that may be received under treaties containing stipulations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys, or of any portion, at a lower rate of interest than five per centum per annum."

and section 3659 thereof, providing that—

"All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum."

In view of these express declarations by the Congress as to the minimum rate of interest applicable to cases involving the handling of Indian funds by the United States and their officers, the omission on the part of the accountants to specify in the account itself the rate per cent. of interest to be paid would seem to be of little consequence, for that is certain which by ready reference can be made certain, and where existing statutes of the United States have expressly prohibited investments of Indian funds, even when made "in stocks of the United States," to be made at less than five per cent., the propriety of charging the United States with interest at the minimum rate where, as here, they were in duty bound to pay some interest, would seem to be beyond question.

Besides, in accepting the Slade-Bender accounting the resolution of the Cherokee National Council, passed December 1, 1894, expressly recited that it accepted the total of the principal sums due as reported to it by the United States "*with interest thereon at the rate of five per cent. per annum from the various dates of items composing this claim.*"

This resolution was at once made known to the Secretary of the Interior and a copy thereof transmitted by him to the Congress on January 7, 1895. At no time until now has the United States through any of its agents, executive, legislative, or judicial, questioned the general understanding that the principal amounts admitted by the accounting to be due should carry interest at the rate of five (5) per cent. The point was not made in the court below, and the propriety of the rate is conceded here by counsel for the Government with respect to the three uncontested items.

The right to interest in this case cannot be said to at all fall within the prohibition of section 1091 of the Revised Statutes of the United States, nor within the principles announced by this court in the case of Tillson *vs.* United States, 100 U. S., 43, but it does fall within the reasoning of this court in the case of The United States *vs.* Old Settlers, 148 U. S., 478, where it was said:

"In this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed (and) was accepted as valid and binding by the United States, * * * In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated."

That it was intended and contemplated by both parties to the convention of 1891–'93 that the United States should render a complete account of the moneys due, both principal and interest, cannot reasonably be doubted. The suggestion that because the account itself as submitted to and acted upon by the Indians did not in terms specify the interest rate to be paid upon the amounts admitted to be due, "with interest," although the public statutes of the United States and the definitive action of the Senate, which the Congress had already recognized and approved by making appropriations based thereon, had definitely specified an applicable rate, will hardly appeal to a court of justice. Here the lands for which the Indians are now seeking to compel the payment of the balance of the purchase-money have been in the possession and enjoyment of the United States or their grantees for more than twenty years. Why should not the guardian who has improperly withheld payment from its ward be required, upon principles of established equity as well as of sound law, to repay with interest added?

But it has been, and may again be, urged that the position of the Cherokee Nation in thus insisting upon the contractural force of the account stated is technical, and that therefore the position will not be regarded with favor. That argument would not be heard coming from a private party in a similar case. It is difficult to see why it should be given weight here.

There was no surprise in the result. The demands in question were as old as the treaties themselves, out of which they grew. In fact, these demands for money compensation under the treaties were substitutes reluctantly accepted for the earlier and very earnest contention that the entire treaties were the result of governmental dictation, and were, therefore, without validity. But these money demands had been clung to and urged as affording the only relief for an accomplished wrong which the Government would countenance. Throughout the negotiations for "The Outlet," leading up to the treaty of 1891–1893, these demands, principal and interest, were insisted upon. This appears from the official discussions and reports of that time (Transcript, p. 104). The agreement of the United States to render its account of these demands, for consideration or acceptance, by the Cherokee Nation is one of the two chief considerations for the sale of "The Outlet."

Nor was the result an accident. It was reached without aid on the part of the Cherokee Nation. Acceptance of the account as rendered constitutes their sole contribution to its binding force between the parties.

Throughout the United States acted upon its own methods and by its own agencies in a feeble attempt to render tardy justice to the Cherokee Nation. As was well said by the commissioners, who negotiated the agreement of 1891 on the part of the United States: "The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no

possible reason can exist why the error should not be corrected" (Transcript, p. 104). To repeat, no private party would be heard to dispute an account rendered under such conditions, and we submit that the United States should be held to the same rule.

Finally, we submit that if the account as rendered were open to present inquiry, the same conclusion would be reached. Upon the merits of the case in every aspect the judgment of the Court of Claims asserting liability on the part of the United States was correct.

The contention of the Government appears to be that the demand here in question rests entirely upon article 15 of the treaty of 1835. The argument is that the Eastern and the Western Cherokees, having received all their *per capita* payments to which they might have become entitled by the provision of said article 15, the liability of the United States to them is accordingly exhausted, and the report of Messrs. Slade and Bender lacks all foundation.

This, we submit, is neither an accurate nor a full statement of the matter. It is true that if the wording of said article 15 of the treaty of 1835 alone is to decide this case the Cherokees have been paid in full. The settlements made with the Eastern Cherokees in 1851 and the receipts at that time executed by them cover every claim to per capita distribution provided for in said section. They were even allowed for subsistence to which, strictly speaking, the Eastern Cherokees were not entitled. The settlements made with the Western Cherokees at the same time, supplemented by the allowance for subsistence made to them by the decision in the "Old Settlers" case, put them in precisely the same position in which the Eastern Cherokees were left.

The real question therefore is, Did these settlements sat-

isfy the actual obligations of the United States? We contend not, and for these reasons: The principal item in question in this case grows out of the fact that removal expenses of the Eastern Cherokees were taken out of the $5,000,000 fund to be paid for the Cherokee lands under the treaty of 1835. Had the Government the right to do this, or was the United States bound to pay this expense in addition to the purchase-money for said lands?

Article 15 of said treaty of 1835 is as follows:

"ART. 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, *removal* subsistence, and debts and claims upon the Cherokee Nation and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invented for the general national fund provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed; and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east, they shall also be paid for their improvements according to their approval value before their removal where fraud has not already been shown in their valuation."

If article 15 of the treaty of 1835 expressed the entire obligation of the United States, the Government would have support therein for its contention. But this is not the fact. As far back as the treaty of 1828 made with the Western Cherokees the United States, for a consideration, assumed to pay the removal expenses of Cherokees who might desire to go west to join their brothers. This is the language (Transcript, p. 83) of that treaty:

"The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions secured for their comfort, accommodation and

support by the way, and provisions for twelve months after their arrival at the agency," etc.

In no treaty since then has this obligation of the United States been released.

President Jackson's letter of March 16, 1835, addressed to the Eastern Cherokees, confirmed this obligation in these words (Transcript, p. 85):

"3d. For the removal at the expense of the United States, of your whole people," etc.

Again, the treaty of 1835 with the Eastern Cherokees (in which article 15 is found) confirms the obligation of the United States to pay removal expenses, both by inference and in express terms. Article 1 (Transcript, p. 86) says:

"The Cherokee Nation hereby cede * * * all lands * * * and hereby release all their claims * * * for spoliations * * * in consideration of the sum of five millions of dollars, to be expended, paid and invested in the manner stipulated and agreed upon in the following articles."

This sum was therefore the purchase-money.

Article 8 of the same treaty (Transcript, p. 86) says:

"The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there," etc.

Article 17 of the same treaty (which is not included in the transcript) says:

"All stipulations in former treaties which have not been superseded or amended by this shall continue in full force and effect."

Nowhere is there an express repeal of or release from this reiterated obligation of the United States to pay removal expenses. The Government is therefore forced to rely upon the inference to be drawn from article 15 for this result.

We submit that this article nowhere states that the United States shall be so released, or, indeed, that the Cherokees shall pay for their removal. The article merely makes provision for ascertaining how the fund for per capita distribution shall be ascertained. This method is not necessarily exhaustive of the entire fund. A large part of it is otherwise disposed of by the treaty itself. The utmost that can be said is that the several provisions are not in apparent harmony. Admitting this, will the repeated unequivocal promises on the part of the United States to pay removal expenses be construed out of its treaties and contracts because a provision for the per capita distribution of part of the fund appears to be in conflict with this obligation?

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of more extended meaning than their plain import as connected with the tenor of the treaty, they should be construed as used only in the latter sense. * * * How the words of a treaty were understood by this unlettered people, rather than their critical meaning should form the rule of construction."

Worcester *vs.* Georgia, 6 Peters, 515, 582.

This is the rule to be commonly accepted. It is accentuated by another rule that language shall be construed most strongly against the party who prepared the instrument. Both rules find peculiar application in a case in which it is admitted that the treaty in question was prepared by an adroit representative of the Government, and that in fact the document is called a treaty only by courtesy, because the consent of the Cherokees was never given, and the terms of the so-called treaty, so far as the removal of the Indians is concerned, were finally carried out by military force.

We submit that there is no circumstance in this case, which goes to show that the Cherokees at any time understood or suspected that the United States had been released

from its obligation to pay for their removal expenses. That being so, they were entitled to insist upon this obligation, which they then did do in express terms, as appears from the supplementary articles of the treaty of 1835, upon which they were finally forced to rely.

In the Eastern Cherokee case, 117 U. S., page 301, the court says: "They (the United States) also agreed to remove the Indians to their new home" (referring to this same treaty).

The attitude of the Cherokees at the time and since then bears out this contention, and the course of the Government in making an appropriation of $600,000 to include removal expenses by the supplementary treaty of 1836 was a concession on its part of the correctness of their position (Transcript, p. 87).

Subsequent to this nothing occurred to affect this question The purpose of the treaty of 1846 was merely to unite the branches of Cherokee people, to adjust differences, and to settle the Government's liability for per capita distributions. Articles 4 and 9 of the treaty of 1846 (Transcript, pp. 94–'6) provide for the settlement of these per capita claims of the Western and Eastern Cherokees respectively. Their receipts (Transcript, pp. 99 and 100) express the same purpose. When all has been said and done, the payments made under the treaty of 1846 and the receipts given for these payments do not accomplish more than to exhaust the Government's liability to make per capita payments under article 15 of the treaty of 1835.

The remonstrances of the Cherokees (Transcript, pp. 98–'9), however, reached beyond these payments and consistently enough asserted the real claim that the Government had no right to take removal expenses out of the treaty fund, and that this obligation of the Government had nowhere been released.

This claim was thereafter repeatedly recognized by Gov-

ernment officials, and it forms the foundation for the account which was rendered by the United States to the Cherokee Nation under the agreement of 1891–1893.

The Slade and Bender account was made after the final decision by the Supreme Court of the "Old Settlers" case. The question, therefore, is, what was the foundation of the account? The court had decided that per capita distributions to Eastern as well as Western Cherokees, claiming under the treaties of 1835 and 1846, must be charged with removal expenses (Court of Claims, Rep., vol. 27, p. 45–'6). True the claims of the Western Cherokees alone were involved in the decision. But the principle in both instances is the same, and the language of the court covers both branches of the Cherokees. Again the language of the treaties of 1835 and 1846 is equally clear in its references to both cases; so that the decision of the court made in one case, must necessarily conclude the other.

The court did not say that the fund provided by the treaty of 1835 must be charged with removal expenses. If the court had so said, we should still maintain that the account is, for the reasons hereinabove stated, binding upon all parties. But the court made no such decision. The court has, however, distinctly defined the rights of all per capita distributees of either branch, and according to that decision the express provisions of both treaties upon that subject have been satisfied. What, then, becomes of that part of the treaty fund which according to the finding of the award has been improperly charged with these removal expenses? In the nature of things it goes where all other property secured by the treaty of 1835 has gone that had not been specifically otherwise applied or directed. It goes where the lands had gone, where the school fund had gone, where the national fund had gone. It goes where the undisputed items in this very suit, regardless of their origin or their time, go, and for the same reasons. In other words,

the fund which is secured by the Slade and Bender account does not fall within the provisions for per capita distribution under either treaty, and that fund must therefore go to the general funds of the nation or must be distributed among all its people in such manner as may be here determined. This fund is clearly such property as was contemplated by the act of union between the Eastern and Western Cherokees (Transcript, p. 91).

The Slade and Bender account need not, and we suggest does not, rest upon the letter of the treaties of 1835 and 1846. It builds upon equity, promises equity, with due regard to the principles of broad justice and sound policy. The account, we submit, does not depend solely upon the express provisions of the treaties of 1835 and 1846. It rests upon the obligation to pay removal expenses, which was expressly assumed by the Government under the treaty of 1828, which has never been abrogated. It recognizes the promises of President Jackson made to the Cherokees prior to 1835, which were never withdrawn. It respects the explicit promise in article 8 of the treaty of 1835 itself. It considers the repeated authoritative representations made to the Cherokees by agents and officers of the Government, which have never been repudiated. It recognizes, as the Senate felt bound to concede immediately after the treaties were announced, that they, the treaties, did not really express the actual understandings with the Indians. The account recognizes the truth of the Cherokees' protests and remonstrances made prior to and at the time of the treaties and continued for half a century afterwards, which constituted in 1893 the basis of the demand for an accounting embodied in the treaty of that year. The award stands upon the moral and political obligations of the Government, made in innumerable ways in the course of its dealings with the Cherokees; obligations, we may add, which the Cherokees had better reason to understand and to rely upon

than they had upon so-called treaties to which they are admitted not to have been actual parties at the time of their making. To repeat, this fund so established should go where other considerations growing out of these treaties of 1835 and 1846 have gone, and in the same manner. Happily this fund will be relieved from the difficulties and contentions of forced treaties and inconsistent compromises; and as to it, at least, the Government is now in a position justly to interpret the treaty of 1835, as though all Cherokee property had at that time belonged to one nation, and as though all Cherokees had been willing parties to that treaty, of which few of them, indeed, had so much as notice, although it was destined to settle their property rights and their fate as a people.

This, we submit, leads to a just decision of this case in keeping with the enlightened policy that has prevailed in other cases of a similar character. The account "furnished the nearest approximation to the justice and right of the case, that after this lapse of time it is practicable for a judicial tribunal to reach."

Choctaw Nation *vs.* United States, 119 U. S., p. 39.

Moreover, whatever the claim to have the United States pay removal expenses, it was merged in the account rendered to the Cherokee Nation, and by it accepted. The claim, though disputed, embodied an existing legal liability, which was merged in the account rendered to the Cherokee Nation just as an open account would be merged in a promissory note given in settlement of it. If it only constituted a *bona fide* demand, to which the Government may have had a legal defense, nevertheless the United States must be held to have waived its right to make such defense by the act of 1893, and that *bona fide* demand furnishes the foundation for the liability, which has now been given definite and final form in an account rendered by the United States and accepted by the Cherokee Nation.

On behalf of the Government it is contended that the agreement of the United States in the act of 1893 was merely to account for and pay "moneys *due* the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1828, 1835," etc.; that whatever rights the Cherokee Nation may have had under the treaties enumerated had been satisfied and extinguished by subsequent accountings, settlements, and litigation between the parties, and hence that there were, as a matter of law, no "moneys due the Cherokee Nation" under any of said treaties at the time this agreement was made. From this it is argued that the accounting had under that agreement, in so far as it allowed the Cherokee Nation items for which the Government was under no pre-existing absolute legal liability, was *ultra vires* and void.

This argument in its last analysis amounts to this: That the treaty of 1893 added nothing to the existing rights of the Indians; it gave them merely the privilege of having a statement rendered showing the amounts theretofore paid to them without regard to how just or unjust had been the previous settlements with them.

It cannot be denied that prior to the treaty of 1893 there had been accountings, settlements, and litigations between the United States and the two branches of the Cherokees, which the Government insisted determined conclusively the question of its legal liability under the treaties enumerated. Nor can it be denied that the Cherokee Nation contended that the previous accountings and settlements were improper and unjust, and as a condition precedent to its agreement to cede "the Outlet," it demanded that the questions (which the Government claimed had been) concluded thereby should be reopened and reconsidered. (Transcript, page 103.)

In recognition of this demand the act of 1893 expressly provided for the rendering of a new account to the Cherokee Nation of moneys "promised but withheld by the United States from the Cherokee Nation under any of said

treaties" and granted to the Nation the right, if it so desired, to have the courts pass upon the question whether any amounts of money were "improperly or unjustly or illegally adjusted in said accounting."

Under the rule of construction announced in Worcester *vs.* Georgia, *ubi supra*, can it be contended that the agreement of 1891–1893 intended to leave the Indians concluded by prior settlements, the claimed impropriety and injustice of which had caused this very stipulation to be inserted therein. Can it be contended that the only thing which the Indians bought by this special condition for the cession of their lands was the right to have the Government recall the accounts which had already been made up without any re-examination of the charges and credits appearing therein?

If this was the understanding, then all reference to the treaties of 1835–'6 and 1846 was without legitimate purpose. Obviously there were few claims which the Cherokee Nation could urge in 1893 as growing out of those treaties. Among these was the claim for moneys deducted for removal expenses in 1838 which is here in question. Against the disallowance of this claim the Cherokee Nation, as such, had protested at the time when the individual Eastern and Western Cherokees gave receipts in full as individuals for the amounts which Congress had appropriated for them in satisfaction of articles 9 and 4 of the treaty of 1846, respectively. This claim had never been abandoned, and when the promise was made by the United States in 1893 to render an account of moneys due the Cherokee Nation under the treaty of 1835, that item alone occupied conspicuous position in the minds of both parties. The United States must, therefore, here take the position either that it was its purpose in 1893 to mislead the Cherokee Nation by an unfounded expectation, or that it was its purpose to reconsider and restate this account. For what other purpose could the treaty of 1835 have been referred to? The question furnishes its own answer, and the Cherokee Nation, by the Slade and Bender accounting,

received no more than it had fair reason to expect. Had the account omitted this item, the Cherokee Nation might still have resorted to the Court of Claims to establish its contentions thereabouts. When the item was allowed in the Government's own account and credit thereby given to the nation therefor, the Cherokee Nation's oft-repeated contention was made good, and had the Congress made appropriation to cover the sum of money so found to have been withheld, as it had agreed to do, the oft-repeated demand of the Cherokee Nation in this regard would have been fully met.

In this connection the Government lays especial stress upon the decision of this court in the Old Settlers' case (148 U. S., 478), as concluding the question of the legal liability of the United States under the treaty of 1835.

For the sake of argument, let the full effect claimed by the Government be given to that decision, and let it be assumed that it was there decided that the Government was under no obligation to pay what is now and was thereafter claimed to be due on account of removal expenses, still that decision can have no effect upon the present case, either under the doctrine of *stare decisis* or the doctrine of *res adjudicata*.

This suit is for the enforcement of the express promise of the United States contained in subdivision four of the second article of the agreement of December 19, 1891, as ratified March 3, 1893. That promise was made after the decision referred to had been rendered. It was a promise to pay upon certain conditions which, it is admitted, have been strictly fulfilled. It rested upon an independent valuable consideration, of which the United States has now had the enjoyment for many years, and which, confessedly, cannot now be restored to the nation which parted with it. Can the validity or effect of this promise be in anywise affected by the fact that before the promise was made, in a collateral proceeding to which this nation was not a party, it had

been decided that as a matter of law the United States was under no existing obligation to pay a part of the amount which it subsequently admitted to be due and expressly promised to pay?

In its legal aspect there is no difference between a promise to pay a sum to be ascertained in a specified manner and an absolute promise to pay a sum certain. As soon as the sum is ascertained the obligation is as complete and the liability as fixed as if the amount had originally been fixed by the terms of the promise. If then, as part of the purchase price of the Cherokee Outlet the United States had agreed to pay the nation the amount due the nation under previous treaties, "which amount is hereby fixed at $1,133,841.98, with interest, etc.," instead of providing for the subsequent fixing of the amount, could it have been contended that the effect of that promise or the extent of that obligation would be in the slightest degree modified by the fact that, prior to the making of the agreement, it had been decided, in a collateral proceeding that, with respect to a portion of the amount so fixed, the United States was under no existing legal obligation? Obviously not, we submit, and yet in legal effect this is the defense now presented.

In short, the obligation here sought to be enforced rests upon an express contract made after the decision in question was rendered, based upon an independent consideration which passed after that decision had become final, a contract, the obligation and binding effect of which depends upon that consideration and not upon the question as to whether there was or was not a preëxisting liability to pay the sums agreed to be paid. As is concisely said by Chief Justice Nott in his opinion below: "It is manifest that the agreement here intended something more than that the Cherokees might come into court to be immediately turned out under previous decisions" (Transcript, page 50).

But if it be true that the United States may have had a perfect legal defense to any claim on the part of the Indians

for moneys due under the treaties mentioned by reason of previous accountings and prior adjudications it is still clear that Congress had the power in its discretion to waive any such defense.

New York Indians *vs.* United States, 170 U. S., 1.

And it was this very waiver by the United States of its technical defenses and its consent to reopen and readjust the questions theretofore technically concluded, which the Cherokee Nation purchased from the United States and paid for in and by the cession of its lands.

If the present contention of the Government be correct the obligations of the Government to the Cherokee Nation remained exactly the same after the act of 1893 as they were before and the promise of the Government to restate the then existing accounts which the Cherokee Nation demanded and received as a condition precedent to parting with its lands, was but the shadow of an irridescent dream. But as was said by the court below (Transcript, p. 50):

"Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them so to believe) that all of their claims and rights and equities were to be reopened and re-examined *de novo*; and that upon the faith of that belief they made the cession of "The Outlet."

II.

The claim of the Eastern Cherokees that the fund belongs exclusively to them has no foundation in the legislation of 1893 under which the account was rendered, or in the earlier treaties of 1828, 1835 and 1846 under which the demand arose, nor can it be predicated upon the acts of 1902 or 1903 conferring jurisdiction upon the Court of Claims to hear and determine claims by the Cherokee tribe or any band therof, against the United States.

Assuming the propriety of the judgment of the Court of Claims as against the United States, the question arises as to whether that judgment was properly rendered in favor of the Cherokee Nation rather than in favor of the Eastern Cherokees.

With respect to the three smaller items, as has been said heretofore, there is no dispute that they were properly adjudged in favor of the Cherokee Nation.

But with respect to the large item of $1,111,284.70, the Eastern Cherokees contend that the judgment should have been in their favor by name, and that so much of the judgment of the trial court as favored the Cherokee Nation by name and the so-called Western Cherokees by specification is erroneous and should be reversed.

The differing views on this subject seem to present themselves most readily for discussion under the following heads:

(A.) The agreement of 1891–1893, which provided for the rendition of an account of all moneys promised but with-

held by the United States under various treaties and upon which alone the Slade-Bender accounting depends for its binding effect fixed an obligation upon the United States to pay the amount found to be due to the Cherokee Nation.

(B.) Apart from the agreement of 1891-1893, and the account rendered thereunder and the designation by the United States of the beneficiary, in case anything was found to be due upon the accounting, the history of this claim shows that this fund should not be adjudged to belong to the Eastern Cherokees alone, to the exclusion of all other members of the Cherokee Nation.

A.

The agreement of 1891, as ratified by the act of 1893, established beyond peradventure the beneficiary, if upon the accounting to be had thereunder anything should be found to be due from the United States.

The position of the Cherokee Nation is that the recovery for the several funds named in the report of Slade and Bender must be had in the name of the Cherokee Nation. The agreement of 1891, ratified March 3, 1893, was made by the United States on the one part and the Cherokee Nation, acting through properly appointed commissioners, on the other part. The consideration which passed from the latter to the former constituted property which belonged to all the members of the nation and was ceded to the United States by the vote of the Cherokee Nation as such.

The language of the agreement is "that the United States shall, without delay, render the *Cherokee Nation*, through any agent appointed by the authority of the *national* council, a complete account of lands and moneys due the *Cherokee Nation* under any of the treaties * * * or any laws passed by the Congress of the United States * * *

and upon such accounting, should the *Cherokee Nation* conclude and determine that such accounting is incorrect or unjust, then the *Cherokee Nation* shall have the right * * * to enter suit against the United States * * and if it shall be found, upon such accounting, that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the *Cherokee Nation* upon the order of its *national* council," etc.

The appropriation of $5,000 was made March 3, 1893 "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the *Cherokee Nation* of moneys due said *nation*."

Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered to the Secretary of the Interior the accounting provided for, and said accounting, after thorough examination by the proper executive officials on the part of the United States, was transmitted through the specified channel to the CHEROKEE NATION, and having been accepted by the CHEROKEE NATION without demur and the Secretary of the Interior having been notified to that effect, said Secretary of the Interior in 1895 transmitted to the Congress "a complete account of moneys due the *Cherokee Nation* under any of the treaties" * * * "and any laws" * * * "prepared in accordance with the provisions of the said act of March 3d, 1893, together with a certified copy of an act of the Cherokee national council accepting said accounting."

These several steps would seem to close the question of liability in this case. Does a reading of the entire transaction raise a doubt as to the sole right of the Cherokee Nation to recover? We submit that the same reasoning which makes the report conclusive upon the United States makes it so

upon all parties claimant here. The Cherokee Nation made the demand for the payment of lands and moneys due it; it secured the agreement; it furnished the consideration; to it the accounting is rendered of moneys due to it; and by it that accounting is accepted. More than that; in the acceptance all the items (some of which are admitted even now by all contestants to be due to the Cherokee Nation as such) are lumped, and the grand total of $1,133,841.98 appearing therein is accepted by the national council as being the amount due to the Cherokee Nation from the United States as a common result of the entire accounting. Plain and unequivocal as was the finding, the report and this acceptance, there was no word of remonstrance or exception of any sort from any source, although it is admitted that the Eastern Cherokees, so called, were in a decided majority in the nation, and were at all times during the progress of these proceedings in control of the national council of the Cherokee Nation. Certainly it will not be argued that undue haste was shown at any stage; after each step many months intervened to give fullest opportunity for reflection and action.

Even if the Eastern Cherokees should be permitted to assert special interest to the benefits of the award, they must come in under the Cherokee Nation and not in opposition to it.

If the Eastern Cherokees were here to assert a distinct claim, based upon treaties and acts of Congress apart from the account rendered, such a position would raise a different question and would call for different consideration. But that position the Eastern Cherokees have abandoned. They admit that the agreement of 1891 and the account rendered thereunder is the ground of the recovery; they must admit, as a necessary consequence, that the judgment must go to the party recognized and named in the agreement for the accounting and to whom the promise to pay what might be found to be due was made. Our position, therefore, is that

the Cherokee Nation stands upon this account and denies the right of any other party to pre-empt its name for the purpose of recovering upon that account.

Even as interpleaders, properly speaking, the Eastern Cherokees would be confronted by the difficulty that the United States owes a contract obligation to the Cherokee Nation. Under a well-recognized rule of law, the United States could not, by forcing another party to interplead, be absolved from an obligation which it owed distinctly to one party as a result of contract. The payment must be made to the Cherokee Nation as the contract reads; and if the fund so paid is to be pursued afterwards, it must be done by separate proceedings against the party who has received that fund in satisfaction of its recognized demand.

Furthermore, the Cherokee Nation is bound to admit that all rights and claims which it may have had prior to 1891, and which are referred to in the agreement of that year, are now merged in the account rendered in pursuance of that agreement. The United States was to make a statement of all obligations for acceptance or rejection. In case of acceptance, the release of all claims not allowed was part of the consideration to the United States for the agreement of 1891 and its ratification by the Congress in 1893. The Cherokee Nation having accepted the account cannot now be heard to renew demands not thereby allowed, nor, indeed, discuss the foundation of those that were allowed, for any purpose other than to show the force and the reason of the account itself. Nor can the Eastern Cherokees, in any event, be permitted to assume the name and style of the whole nation, to assert their claim to the proceeds of the account on the one hand, and, on the other, to appear as a separate band to assert in their own name, independently of the account, the claims which have been either allowed or disallowed thereby. This would amount to affirming and disaffirming the account in one breath. Such a course would confess that the account, if it shall stand, belongs, at

least in the first instance, to the Cherokee Nation, to whom it was rendered by the consent of all parties.

It is only in connection with their contention that as against all other members of the Cherokee Nation they are entitled *equitably* to receive the entire proceeds of the recovery that they seek to go behind the accounting itself and to find in the provisions of the specified treaties an exclusive right in themselves to enjoy its benefit. The supposed exclusive right of the Eastern Cherokees so asserted in these proceedings grows out of and is thought to find support in the provisions of the act of March 3, 1903 (32 Stats., 982, 996), declaring how section 68 of the act of July 1, 1902, which conferred jurisdiction upon the Court of Claims and this court to hear and adjudge the claims of the Cherokee tribe or any band thereof against the United States, shall be construed. The provision of the act of 1903 in question, in addition to conferring upon the "Eastern Cherokees, so called" the status of a band or bands "for all purposes of said section" and directing the manner in which such band or bands should assert their claims—which action was possibly within the legislative competency of the Congress, goes further and purports to amplify the jurisdiction already conferred upon the Court of Claims under said section 68 by authorizing said court "to determine as between the different claimants, to whom the judgment so rendered equitably belongs either wholly or in part." That this amplification of the jurisdictional act was within the legislative competency of the Congress is not by any means clear.

The act of July 1, 1902, formed one element, and that, perhaps, the most important one, of an elaborate agreement entered into by and between the United States and the Cherokee Nation for the surrender by the latter of its tribal government and communal relations, and the reduction of its common property to cash for the purposes of civic and *per capita* distribution under the beneficent supervision of

the United States, acting through the Secretary of the Interior and his subordinates.

By that act the nation and its citizen-allottees surrendered their right of common property; their right to collect their own revenues; their right to distribute their own funds in their own way; their right to determine in their own manner and according to the dictates of their own consciences what names should appear upon their rolls of citizenship; how their school funds should be used and their children should be educated; how and by whom their public roads should be built and their towns established and governed; and how the proceeds of their common property should be distributed. All this they surrendered in consideration, among other things, of the bestowal upon them of the blessings of citizenship and the right under said section 68, on the part of the nation or any band thereof, to institute suit in the Court of Claims against the United States, to secure a judicial determination of the merits of any claim "arising under treaty stipulations which said nation or band might have against the United States."

Said section 68 provided in clear terms for the manner in which either the tribe or "any band" thereof should proceed in the institution, prosecution, or defense of any suit which might be instituted thereunder, it being particularly provided that in such connection any band should act "through a committee recognized by the Secretary of the Interior." By subsequent sections of the act in question provision was made for the ratification of said act "by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation" in the manner therein specified. The act in question was accepted and ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner and in the form proposed by the Congress. It does not appear that the mandatory provisions of the act of 1903, which purported to alter the provisions of

said section 68 of the act of 1901, in so far as the method o procedure by "bands" and of the disposition of the proceeds of any recovery which might be made as against the United States, was at any time submitted to the Cherokee Nation for its consideration and ratification. We submit with great deference that in view of the agreement expressed by the act of July 1, 1903, which had been already partially performed, the consideration for which on the part of the nation had largely passed and has not been offered back, it was not competent for the United States to alter or amend said agreement of its own volition in any particular, certainly not in any substantial particular—such, for instance, as to take away from the nation as such, a legal right to recover in its own name an amount already stated to be due to it upon an account rendered to it by the United States and to bestow the right to recover such amount upon subordinate bands or individual members of said nation.

New York Indians vs. United States, 170 U. S. 1,
14 Diamond Rings Case, 183 U. S., 183.

But if the law was otherwise it could not be claimed that there is a word in the declaratory provision of the act of 1903 to change the legal title to the amounts due under the account stated. As to it the Court must decide in favor of the rightful claimant; that is, for the party to whom the account was rendered. We submit that as matter of law no other conclusion is possible.

What more could the court do under the provision that it shall determine among the different claimants to whom the judgment so rendered *equitably* belongs? After all, equity follows the law. The court will not indulge in mere sentiment; will not say that the award ought to have been different, or that the court might have arrived at a different conclusion from Slade and Bender. There is no foundation here for the assertion of an equitable claim to defeat a legal right founded upon the account rendered.

Such an account stated could only be assailed upon the ground of fraud or mistake, and neither the United States nor the Eastern Cherokees attack it upon either of those grounds. The case of Tillson *vs.* United States, 100 U. S., 43, would seem to bear pertinently upon this point.

In the "Old Settlers Case" 148 U. S. 469, the court says:

"The settlement of a controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto, and the determination of what sum, if any, may be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties, or holding them inoperative on the ground alleged.

"The Court of Claims was indeed to have "unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of the said Indians, may be fully considered and determined."

"But this did not mean that either party was entitled to have or receive, by virtue of the act, anything more than each was entitled to under existing stipulations, or to bring supposed moral obligations into play for the disposal of the case. The inquiry was not to be technically limited by rules of procedure, or restrained by the restrictions between law and equity."

Even if this Court should incline to the view that the Eastern Cherokees had an equitable claim to the funds recovered it would have no legal authority to destroy the right and the title thereto which the whole nation purchased by the cession of its national lands.

If the Eastern Cherokees could show that the account had been rendered to them or had been stated in their favor that might alter the case. But their attempt now to assume the name "Cherokee Nation" cannot avail them.

Upon this point the Congress has left nothing open for judicial ascertainment for the very first section of the act of July 1, 1902, under which this court acquired jurisdiction to determine this case, declares that the words "nation" and

"tribe" as used in said act shall each be held to refer to "the Cherokee Nation or tribe of Indians in Indian Territory." While "Cherokee Nation" or "Cherokee Tribe" clearly includes the "Eastern Cherokees so called," it is equally true that the "Eastern Cherokees so called" do not alone compose the "Cherokee Nation" or "tribe."

The membership of the nation is not made up solely of Eastern and Western Cherokees. By the treaty of 1866, for illustration, members of other tribes and races were admitted into full membership. By such admission the members acquired a full interest in the nation's property.

The agreement of 1891-1893 and the account rendered was intended as a settlement of all disputes between the United States, the Cherokee Nation, and all individual Cherokees, and was in itself a designation by the United States of the beneficiary to whom the fund should be paid.

If in the history of this claim there should be found any real basis in fact for the exclusive claim of the "Eastern Cherokees so called," that would not compel the reversal of the judgment under review. Assuming for argument's sake that historically the claim arose out of a transaction between the United States and the Eastern Cherokees, and involved moneys improperly withheld from the latter in 1838 by the former, nevertheless by the Act of Union of July 12, 1839 the Eastern and Western branches of the Cherokee Nation had become reunited at least in name; and for the purpose of making that Union effective in fact and spirit, as well as in name, the treaty of 1846 had been entered into, by which the United States undertook and seemingly endeavored to adjust all differences between itself and both of the factions in the nation. Under the provisions of that treaty the United States paid to the Western and Eastern Cherokees an ascertained sum in liquidation of their respective claims on account of *per capita* dis-

tribution. Such sums were received and receipted for by each faction as in full settlement of their respective demands, and it is significant in this connection that while both the Cherokee Nation and the Western Cherokees protested against the impending settlements on the ground that proper allowance had not been made therein for the moneys deducted in 1838 from the so-called "Treaty fund," on account of removal expenses, the "Eastern Cherokees" as such did not enter any protest thereabouts. From 1846 to 1891 the claim against the United States on that account was urged in the name of the Cherokee Nation; and in providing for a statement of moneys due the Cherokee Nation, and the payment of the amount so found to be due as provided by the agreement of 1891-1893 the United States but exercised its well understood power of control over and disposition of the properties of their Indian wards. Within the limits of good faith the United States had the undoubted right and power to dictate the manner and terms of the settlement of this long pending and vexatious claim which the Cherokee Nation as a political body was urging against it. The United States having the power to dictate terms elected to exercise it, and recognized the Cherokee Nation as the proper body with which to adjust this difference, and the method of settlement proposed by the United States was agreed to by the Cherokee Nation, of which the Eastern Cherokees formed by far the greater part, without objection or dissent from them. Having through their tribal representatives accepted the method of settlement proposed by the United States, and the Nation itself having altered its position with respect to the ceded lands as the result of such agreement, it is now too late for the Eastern Cherokees to insist that the agreed method of settlement is violative of their individual rights. They are estopped from so doing by their acquiescence in the manner of settlement heretofore agreed to by them as well as by the exercise, on the part of the United States, of

its power not only to adjust disputes between factions of Indian tribes, but in the case of need to abrogate treaties themselves in furtherance of governmental policies.

Even if there was doubt either as to the propriety of the legislation of 1893 affirming the agreement of 1891, that doubt would not justify this court in declaring such legislation invalid; for the legislative action which is now complained of by the Eastern Cherokees was taken by the Congress by virtue of its political and administrative power, and the exercise of such power and the manner of such exercise are not subjects for review by the courts. They are cognizable by the legislative and executive branches of the government.

Cherokee Nation vs. Hitchcock, 187 U. S., 294, 308.

This case does not present any question as to the taking of property, but involves merely the administrative settlement of disputed claims against the United States which were incapable of being enforced save in the manner and by the methods assented to by the latter. No more was done with respect to this item of $1,111,284.70 than was done with respect to the first item of the same account. That item reads:

"Under the treaty of 1819:

Value of three tracts of land containing 1700 acres at $1.25 per acre, to be added to the principal of the school fund. $2,125.00

With interest from February 27, 1819, to date of payment."

By the treaty of 1819 the Cherokee Nation ceded certain lands in the east to the United States, in place of lands which the Cherokees had ceded by the treaty of 1817, but had not surrendered. The United States also agreed to survey and to sell certain other lands for the benefit of the Cherokees. The United States having failed in this, the account corrects

the omission, and gives the amount to the Cherokee Nation. That conclusion is not now disputed by any one.

In both instances in the language of the Choctaw case, 119 U. S., p. 309, the result "furnishes the nearest approximation to the justice and right of the case that after this lapse of time it was practicable for a judicial tribunal to reach."

B

But in no event have the Eastern Cherokees an exclusive right to the fund in question.

If the judgment in favor of the Cherokee Nation is affirmed, the consistent conclusion would be that it belongs to those who are members of the Cherokee Nation. Such would be the rule in the case of any other judicial decision. Furthermore, this was the plain intention of the agreement of 1891-'3, which says in terms that, "the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its National Council" (Tr., p. 104).

The membership of the Cherokee Nation is not made up solely of Eastern and Western Cherokees. By the Treaty of 1866, for illustration, members of other tribes were admitted into full membership. By such admission, upon due consideration moving from them, they acquired an interest in the nation's property, including the very "outlet" which formed the consideration of the agreement of 1891-'3. A judgment in favor of the Cherokee Nation must therefore affirm a right in each and every member of the nation, in the proceeds of that judgment, unless it be held further, that in making the agreement of 1891-3 the nation was a mere trustee for particular members, or indeed, among others, for some Cherokees who have long ceased to be members.

If the first position is sustained, all uncertainty is at once removed. If, on the other hand, the second position is accepted, we respectfully submit that the claim of the

Eastern Cherokees to an exclusive right to the fund is without foundation for the reasons which have been heretofore discussed, and for the further reason that even historically considered, such an exclusive right in the Eastern Cherokees can not be maintained.

The origin of the claim considered, with respect to the contention between the Eastern and Western Cherokees.

It will not be denied that if considerations of justice and a due regard for the government's essential policy had at all times prevailed, there would be no room now for this branch of the controversy. It would hardly be seriously urged that any Cherokee who is now a member of the united Cherokee Nation, is not interested in a fund, which was realized by the sale or concession of Cherokee lands.

However the result may have been reached, it is now the accepted theory that all Cherokees (Western and emigrant), retained an interest in the Eastern land until sold, and secured an interest in the western lands, as acquired. It is immaterial to this discussion, whether in point of fact this policy obtained from the time of the Treaty of 1817, through the period embraced in the Treaties of 1828, 1835 and 1846; or, whether that policy was only accepted with retroactive force at the time when the Treaty of 1846 was entered into between the United States, the Eastern Cherokees and the Western Cherokees. Be it by original intention, when the first Cherokees removed in 1817, or by subsequent consent of both Cherokee factions, expressed in their Act of Union in 1839, or in their treaty with the United States in 1846, in effect the interest of all members of both factions, in all lands, east and west, and in the proceeds thereof, at least, as early as the last mentioned date became absolutely fixed and recognized.

If this statement is correct (and the Treaty of 1846, and the language of the courts in the "Old Settlers" case seem

to dispose of all question upon this point), then it follows that when the United States agreed to pay the Cherokees for the lands in the east, the fund so realized belonged to all Cherokees east and west, just as the proceeds of any other communal property would belong to them all.

The $5,000,000 treaty fund, after satisfying specific provisions of the treaty for the whole nation, and after paying for the individual improvements which are specifically provided for, should have been, and according to the interpretation which the Treaty of 1835 now receives, we submit, must be distributed to all Cherokees who owned the lands which formed the consideration for that fund; that is, the Western and the emigrant Cherokees, and others who have become constituent members of the Cherokee Nation.

The contention of the Eastern Cherokees for an exclusive right to the fund is at war with the accepted interpretation of the Treaty of 1835.

The position of the Eastern Cherokees seems to be, to assert their right to a proportion of the lands in Arkansas, and afterwards in the Indian Territory; but, at the same time, to insist that the United States had a right to stipulate under article 15 of the Treaty of 1835, that the balance arrived at as there provided, shall be distributed *per capita* among the Eastern Cherokees alone. The answer to this position may be framed upon either one of the two theories. If the treaty fund of 1835 belonged exclusively to the Eastern Cherokees, then the Western Cherokees were the exclusive owners of the lands in the Indian Territory; and if this be so, then the taking of the larger portion of these lands for the Eastern Cherokees, by direction of the government, resulted, by operation of law, in raising a corresponding interest in the treaty fund for the Western Cherokees. This seems to be the theory of the Treaty of 1846, which certainly has found acceptance by very high authority.

If, on the other hand, the other theory obtains, that neither faction of the Cherokees had exclusive ownership, or right of disposition of the lands east or west, then it must follow that the United States were not right in agreeing to give the balance of the treaty fund to the Eastern Cherokees *per capita* according to article 15 of the Treaty of 1835. Either theory, we submit, disposes of the exclusive right of the Eastern Cherokees as of the time when the treaty was made.

To repeat, therefore, as a matter of right the demand of the Eastern Cherokees to the balance of the treaty fund should not have been, and should not now be granted. In consenting to article 15 of the Treaty of 1835, the United States clearly undertook to dispose of an interest in lands which, in part, must be held to have belonged to the Western Cherokees.

This position was clearly admitted to be the right one by the Treaty of 1846. The United States recognized that the Western Cherokees were interested even in the *per capita* payment provided for by article 15 of the Treaty of 1835; and this notwithstanding the questionable language of that article. The Western Cherokees were accordingly paid their proper proportion of these *per capita* payments, upon the theory that they were in all respects interested in the lands that had been ceded by the Treaty of 1835. Upon this subject the language of the Court of Claims in the "Old Settlers" case is:

"By the terms of this arrangement the Eastern Cherokees consented to their sharing in the purchase money so far as it was still held by the United States in the form of trusts and annuities; and the United States agreed that so far as it had been paid away to individual Indians and could not be restored, they should pay it over again, and thus make good to the Western Cherokees their rightful proportion of the fund. * * *

"It is proper to say here that this was not the form in which the treaty stated the transaction. The document re-

cites the position asserted by the United States, that the Western Cherokees *'had no exclusive title'* to the territory west of the Mississippi, *'which became the common property of the whole Cherokee Nation by the operation of the Treaty of 1828;'* that, however, the Cherokees then west of the Mississippi, *'by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi, which interest should have been provided for in the Treaty of 1835, but which was not;'* and that they, the Western Cherokees, retain *'a common interest in the general funds of the nation,'* and *'have an equitable claim upon the United States for the value of that interest, whatever it may be.'"*

Old Settler's Case, Vol. 27, Court of Claims, p. 37.

In accordance with this view, payments were afterwards in 1851, made to both Eastern and Western Cherokees. True, mathematical equality was not secured. But equality of right and interest was established; and the payments actually made, realized that equality as far as conditions made such a result practicable at that time.

In making the payments in 1851, the Eastern Cherokees were not charged for subsistence, and a credit covering the same item was afterwards allowed the Western Cherokees in the "Old Settler's" case. The Eastern Cherokees were charged with the cost of their own removal. The Western Cherokees were charged with removal expenses, but in effect this charge was wiped out by a corresponding credit which was right and consistent, because in 1817, and again in 1828, the Western Cherokees had borne the cost of their own removal.

To all intents and purposes the two factions were dealt with upon precisely the same principle, as though the Treaty of 1835 in all its provisions (including article 15) had been made with and for the benefit of the united nation.

But article 15 of the treaty does not govern this fund, because the fund does not owe its origin to that article.

For argument's sake we have discussed the claim of the Eastern Cherokees as though the item in question had arisen under and must now be governed by said article 15, and we have endeavored to show that even then their contention must fail. We now submit that the premises themselves are false.

The Eastern Cherokees rely upon article 15 of the Treaty of 1835 for the order of distribution. But when it comes to establish the fund to be distributed, they are themselves at once driven beyond this article. They seek their claim's foundation in articles 1 and 8 of the same treaty and in the obligations of the Treaty of 1828 and the intervening promises made by accredited representatives of the Government. The paramount question here, however, is, not as to the order for distribution, but as to the creation of the fund. The form of the judgment must of necessity be governed by the title to the fund, and the title must, in turn, depend upon the creation and the growth of the fund itself. Counsel for the Eastern Cherokees affirm article 15 to secure the order, and deny it to secure the fund. For it must be remembered that the very language of article 15, which provides for *per capita* distribution, also stipulates for the *deduction* of removal expenses. To press one aspect is to insist upon the other. The provisions of article 15 must stand or fall together. The article is destroyed by its own inconsistencies. To look elsewhere for the reason of the fund, is to give that fund a new character, and, therefore, a different title.

It is undeniable that there is a conflict in the Treaty of 1835 upon the subject of the Government's obligation to pay removal expenses, and that the present controversy find its source in this conflict. Article 1 of the Treaty of 1835 promises $5,000,000 purchase money; article 8 of

the same treaty distinctly provides that the Government shall remove the Cherokees, and article 15 contemplates that this expense shall be deducted from a surplus to be distributed *per capita*. The first provision is imperative, and is enforced by equally strong promises in the Treaty of 1828; the second is inferential, making provision for a contingency which, as events proved, could never arise.

But it is significant that so soon as the United States assumed to pay removal expenses, article 3 of the suplemental Treaty of 1836 provided that any surplus of the $600,000 "which may remain after removal and the payment of the claims so ascertained, shall be turned over and belong to the education fund," in other words, shall belong to the nation. If the Cherokees paid for the removal, then the surplus should be divided as section 15 provides. If the government paid for the removal, then article 15 became inoperative. The supplemental articles of the Treaty of 1835-'6 constituted a first step towards settling the ambiguous and seemingly inconsistent provisions of articles 1, 8 and 15 of the treaty proper, and to that extent eliminated article 15. The account upon which we now rely has removed the last doubt, and the theory upon which article 15 was framed has been positively and permanently put out of the case.

Since there is this conflict in the Treaty of 1835, which position will the Eastern Cherokees take, or rather, which position are they compelled to take? One of the views expressed in the treaty must yield. Will the Eastern Cherokees stand upon article 15, which is inconsistent with the account stated; or, upon the general treaty promises, which have been sustained by the account rendered?

As between the Eastern and Western Cherokees, shall a provision for distribution prevail, which is based upon a theory which for the purposes of this discussion has been abandoned and which is here and now disclaimed by all the complainants? Shall this exceptional provision for specific payments, based upon a view which yielded in the conflict

of the treaty, outweigh the plain unqualified promise to pay the rightful owners for the lands? We submit that, considered in this aspect, the terms of the Treaty of 1835 send this fund where the account has placed it—into the hands of the Cherokee Nation, where, by the express terms of the union agreed upon in 1839, all interests and titles in common lands and common funds vested as per the following recital:

"And also that all rights and title to public Cherokee lands on the east or west of the river Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation, as constituted by this union" (R., 91).

The fund now in question arises under the affirmative obligations of the United States, expressed in several treaties, stripped of all inconsistencies and conditions that were injected into the Treaty of 1835 upon a mistaken theory that has now been disregarded by the United States and the Cherokees. The equitable considerations which the Eastern Cherokees urge, fail of support.

To the contrary the fund is carried precisely where it was placed by the agreement of 1891-'3 and the account rendered. In the language of the account, it is an "Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund."

The exclusive claim of those Eastern Cherokees who did not go west, and who never became members of the Cherokee Nation, is if possible even more untenable.

They were given certain rights, all of which have been satisfied. According to article 10 of the Treaty of 1835, the general payments went to the "whole Cherokee Nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee Nation west of the Mississippi river."

This provision appears to exclude these Cherokees from participation in the "amount which has been improperly charged to the treaty fund" of the Cherokee Nation.

Assuming that so much of the judgment of the Court of Claims as awards the sum of $1,111,284.70 to the Cherokee Nation is correct, and should be affirmed, still it is respectfully submitted that said judgment should be modified, in so far it directs distribution thereof to be made by the Secretary of the Interior directly to the Eastern and Western Cherokees, who were parties either to the Treaty of New Echota, as proclaimed May 23, 1836, or the Treaty of Washington, of August 6, 1846, as individuals, whether east or west of the Mississippi river, or to the legal representatives of such individuals.

Section 68 of the Act of July 1, 1902, conferring jurisdiction upon the Court of Claims to hear and determine this claim did not confer equity powers upon that court, nor upon this court, when exercising its appellate powers.

The jurisdiction conferred was strictly legal as opposed to equitable, and as above suggested, the Congress, by the subsequent act, March 3, 1903, was without lawful power to enlarge this jurisdictional power, or to alter the mode and manner of the distribution of funds of the tribe and "monies accruing under the provisions of this act," without the consent of the Cherokee Nation, formally expressed as provided for, by sections 74 and 75 of the former act.

In so far as the judgment of the Court of Claims contravenes the terms of the Act of July 1, 1902, in this and other respects, if any such appear, it should be modified and as so modified should be affirmed.

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